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CANADIAN RAILWAY CASES.

CONTAINING

A SELECTION OF CASES AFFECTING RAILWAYS RECENTLY DECIDED
BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,
THE SUPREME COURT AND THE EXCHEQUER COURT
OF CANADA, AND THE COURTS OF THE PROVINCES
OF CANADA, INCLUDING DECISIONS OF THE BOARD
OF RAILWAY COMMISSIONERS FOR CANADA,
PUBLISHED BY AUTHORITY OF THE
BOARD, WITH NOTES AND COMMENTS.

BY
ANGUS MACMURCHY
AND
SHIRLEY DENISON
OF OSGOODE HALL, TORONTO.
BARRISTERS-AT-LAW.

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VOLUME VI.

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ERRATA.

Page 1, line 1, headnote, for "199" read "194."

Page 171, line 4, from bottom, headnote, for "such" read "each."

Page 356, line 5, from bottom, headnote, between "grove" and "around"
insert "without cutting down the trees by making a rectangular detour."

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N.B. The wording or arrangement of many of the sections of R.S.C., cap. 37, differs from the wording or arrangement of the sections of the previous Act so that for purposes of comparison the two Acts require to be carefully examined in order that any differences in meaning may be discovered.

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CANADIAN RAILWAY CASES.

FENCES—CATTLE—NEGLIGENCE.

QUEBEC.]

[KING'S BENCH.]

THE QUEBEC CENTRAL R.W. CO. v. PELLERIN.

(Q.R. 12 K.B. 152).

(Translation.)

Responsibility—Railway—Lack of fence by the consent of the neighbouring proprietors—Canada Railway Act, 51 Vict. ch. 29, sec. 179.

Held, section 199 of the Canada Railway Act, (51 Vict. ch. 29) obliging railway companies to construct fences on both sides of their track, is imperative and a matter of public interest, and the responsibility it imposes extends to a third party whose animal being lawfully on neighbouring ground, is killed owing to the absence of such fence, although it was at the request of the proprietor whose land bordered on the railway track, that the company omitted to make said fence.

Present—Sir Alexander Lacoste, Chief Justice, Bossé, Hall, Wurtele, Ouimet, JJ.

APPEAL from a judgment of the Superior Court for the district of Arthabaska, Choquette, J., in the following terms:

Considering that the plaintiff in effect alleges:

That the defendant operates a line of railway from Sherbrooke to Levis passing through the village of Kingsville and in Thetford township.

That the said railway track for a considerable distance in these two places is not fenced nor provided with cattle guards.

That about the 11th day of June last past, without any fault on the part of the plaintiff, but owing to the fault, negligence and want of skill of the defendant and of its employees, and owing to the lack of fences and cattle guards, the plaintiff's black mare worth \$150, was killed on the said defendant's railway line, and that about the 11th of August last past, also by

I—VI. C.B.Y.C.

the fault and negligence of the said defendant, and the lack of fences and cattle guards, another horse worth \$100, belonging to the plaintiff was also killed, plaintiff praying for a condemnation for the sum of \$250, the value of his two horses.

Considering that the defendant has pleaded to this action that if as plaintiff alleges his horses were killed, it was due to his own fault and negligence, in having allowed them to wander alongside the railway track in spite of the repeated warnings of the employees of the said railroad, and that when the horses went on the track they were not lawfully upon the neighbouring land, which did not belong to the plaintiff, that they were trespassers, and that the defendant is not responsible for the accidents which occurred; defendant alleges besides that if there were no fences or cattle guards through a certain part of the village of Kingsville and the county of Thetford, it was by reason of an understanding which had been arrived at between the railway company and the proprietors of the neighbouring lands, at these places.

Considering that it appears by the proof that about the 11th day of June last, the plaintiff who was working in the neighbourhood, having left his horse to graze along the lumber piles of the Fortier Mill, with the consent, tacit if not express, of the said Fortier, both in his own name and as representing the King Company, and plaintiff having then gone to catch the horse by the name he was about to cross the railway track of the defendant's, when a train came along and frightened the said horse, which broke away from the plaintiff, and, owing to the absence of fences and cattle guards, ran upon the track, was struck by the engine and had his leg broken, and plaintiff was obliged to shoot him.

Considering that on the said day, the plaintiff's horse was legally and rightfully upon the land belonging to the said Fortier, or to the King Company, and that plaintiff was leading him prudently and in the ordinary manner under such circumstances, as they do it in the country, and it was not by his fault that the horse broke away from him, and that in

all probability the horse would not have been hurt if defendant had obeyed the law by erecting fences and cattleguards, and that consequently defendant is responsible for the accident and must pay the value of the horse (Canadian Railway Act, section 194, amended by 53 Vict. ch. 28, sec. 2).

Considering that as to the other horse killed in August last, the Court is very doubtful not only as to the legal responsibility of the defendant, but also as to the ownership of the said horse, the defendant is entitled to the benefit of the said doubt.

Considering on the whole that plaintiff has proved the allegations of his action only with regard to the first accident, and that the horse wounded at that time, and which he was obliged to shoot, was so wounded by a railway train belonging to the defendant and then under the control of the defendant's employees, and that the said accident happened owing to the fault and negligence of the said defendant, and that the said horse was worth \$100.

The Court condemns the defendant to pay the plaintiff the said sum of one hundred dollars with interest from the service of the action and costs of an action of that class.

The declaration is as follows:

The respondent alleges in his action,

1. That he is a carter.
2. The defendant operates a line of railway passing through the township of Thetford.
3. This line is not fenced for quite a distance in the said township of Thetford.
4. On the 11th of June, 1901, the appellant killed on its track on account of this lack of fences and cattle guards a black mare valued at \$150, belonging to the respondent.
5. On the 11th of August, 1901, the appellant killed, owing to the same negligence, another horse worth \$100, also belonging to the respondent.

And the respondent demands judgment for the sum of \$250.

The plea is as follows:

The railway is fenced and furnished with cattle guards wherever requested by those having the right to do so; but appellant is not bound to construct fences to prevent animals from wandering on its track.

If respondent's horses were killed there, it was due solely to his gross fault and negligence in leaving them to wander illegally and without right, without leaving them under the care of some one able to take care of them, in such a way as to prevent them from getting on the railway track on which they were both and each of them trespassing at each of the said dates.

That appellant is not guilty of any fault or negligence which could make it responsible in any way towards the respondent which said respondent has admitted.

Finally supposing that the facts which the respondent alleges were true, he still has no action against the appellant.

(a) Because at the time of the accident his horses were trespassing on the railway, having got there from an adjacent place where in the circumstances they were not and could not be legally:

(b) Because the respondent in so allowing his horses to wander in spite of the notice of appellant and its employees, without committing them to the care of any one, has contributed to the said accident by his gross fault and negligence, and that in the circumstances no fault can be imputed to the appellant.

P. H. Côté, for the appellant.

We believe that according to section 271 of the Railway Act, 51 Vict. ch. 29, the question of absence of fences and of cattle guards, cannot even be raised here, because the horse killed on the 11th of June last was wandering at large on a public place and within half a mile of the intersection of the public with a railway track. It was free having no one to take care of it, and prevent it from wandering, and having been killed in those circumstances, the respondent has no recourse against the appellant. This doctrine has been maintained in the Province of Ontario in the case of *Nixon v. G. T. R.*, 23 O.R. 124, and quite lately

by the Supreme Court of Canada in the case of *G.T.R. v. James*, 31 S.C.R. 420 *et seq.*

We submit further that the respondent has been guilty of gross fault in not furnishing himself with a halter of some kind to tie his horse when he knew that he was obliged to lead him when a train was going to pass, and we submit further that it is inexcusable negligence to have led him there by the mane; for in such matters the degree of care and of prudence exercised by the owner of an animal must be so great that the animal cannot escape or get away. If the owner cannot prove such vigilance and absolute care, he is guilty of negligence in the eyes of the law, and his animal is considered as wandering, and that condition is a bar to any claim.

A decision in this sense was given by the Supreme Court of the State of New Jersey in 1865, in the case of *Price v. New Jersey R.W.*, 31 N.J. L. Rep. 229.

Second proposition.

The respondent's horses having got upon the appellant's railway line, from a place where they were, both and each of them, without right, appellant is not responsible for their loss.

In fact, if we refer to old legislation with regard to the obligation of railway companies to fence their tracks, we see that no penalty was imposed for their default to do so, but that the company was pecuniarily responsible only towards the owner of an animal killed, and that in determining this responsibility, our Courts have established a unanimous jurisprudence, based on the principle well known to the common law, of contributory negligence, to wit, that if there was fault or negligence on the part of the owner of the animal, the company could not be held responsible for his loss: (1858), *Dubord v. G.T.R.* 14 L.C.R., 142; (1858), *Daniels v. G.T.R.* 11 A.R. 471; (1864), *Rouz v. G.T.R.* 14 L.C.R. 140; *Conway v. C.P.R.* 12 A.R. 708.

Under the rules of English Law, (1854), *Manchester R.W. Co. v. Wells*, 25 English Law and Eq. Rep. 373, "A railway company are not, either at common law or under the statute, bound to fence against cattle straying on a highway, run-

ning alongside their railway, and they are therefore not liable for injuries sustained by such cattle in getting from such high-road and upon their railway through a defect of the fences, although the cattle had strayed on the highway road without any fault of their owners."

Such was the jurisprudence in England and in this country when in 1888 the Canada Railway Act was modified so as to limit the responsibility, and in fact to relieve the company from any responsibility in the case of contributory negligence on the part of the owner of the animal killed on its track; for up to that date under the federal statutes, 42 Vict. ch. 9, sec. 16, subsec. 2, until the fences and gates were put in position, the company was responsible for all damages caused by its trains to the animals on its track, and that without any distinction or limitation whatever.

The first change tending to limit the responsibility to a certain class of accidents was introduced in 1883 by 46 Vict. ch. 24, sec. 9, par. 2, by which it was enacted that the railway company would be responsible for all damage caused on its track by its trains to the animals of the occupant of the land, on which the said fences had not been erected. As we see it is only by an almost insensible gradation that the legislature has come to the help of the companies so as to place upon them responsibility in certain cases only.

It is for this object that the Railway Act was again amended in 1888, by 51 Vict. ch. 29, sec. 194, in which amendment this tendency is still more accentuated. In fact, section 194 renders the company responsible only for damages caused by its trains to animals which are not wrongfully on its track, and finally by the last amendment to the said Act, 53 Vict. ch. 28, sec. 2, (1890), contributory negligence of the proprietor, as a reason for exoneration of the company, has been still better defined and responsibility absolutely limited to one case only, to wit; that if the fences that the law requires have not been erected, and in consequence of such omission, an animal gets on to the track, from adjacent ground, where in the circumstances it

might be lawfully, then in that case only, the company is responsible towards the proprietor for the damages caused by its trains.

We cite in support of our contention the judgment of this Court in the case of the *C.P.R. v. Cross*, R.J.Q. 3 Q.B., p. 170, *et seq.*, and of the same Court in the case of the *G.T.R. v. Campbell*, in the same vol. p. 570 *et seq.*, two cases which seem to us to be absolutely identical with the present, and in which the principle submitted by the appellant has been maintained.

In the Court below, the respondent has invoked in his favour the dispositions of the Railway Act of the Province of Quebec, but we believe that this pretension cannot be seriously urged, for the local Act certainly does not apply to the Quebec Central, which was not only incorporated after Confederation by 32 Vict. ch. 57 (Quebec 1869), but has also, in 1883 (46 Vict. ch. 24, sec. 6), been declared by the Federal Parliament to be an enterprise for the general advantage of Canada.

Then by section 92, par. 10 of the British North America Act, the legislatures of each province have the exclusive right to make laws only with relation to works and enterprises of a local nature, that is to say, to enterprises other than those which although entirely situated in the province may be, before or after their completion, declared by the Federal Parliament to be for the general advantage of Canada. From this we conclude that the local Act does not affect the appellant, but that it is subject only to the authority of the Parliament of Canada.

Then the local Act, second vol. revised S.Q., article 5171, renders the company absolutely and entirely responsible for damages caused by its trains to animals on its railway tracks only if it has not erected the fences and the gates which may be demanded of it—evidently by the proprietor of the neighbouring land, while section 194 of the Federal Act, 51 Vict. ch. 29, as amended by 53 Vict. ch. 28, sec. 2, limits the responsibility to one case only, saying that if the fences required by the Act are not made and constructed, and that in consequence of this omission, an animal gets on the track from an adjacent place

where, in the circumstances, it might lawfully be, then, and only then, the company will be responsible towards the owner of the animal for the damages caused by its trains.

This disposition is absolutely different from the local disposition above cited, and consequently there is incompatibility between the two, and according to section 2 of paragraph 92 of the British North America Act already cited, the federal law is alone applicable to this case.

We believe we have shewn sufficiently that neither of the two horses belonging to the respondent reached the appellant's railway track from an adjacent place, where it might be there and then lawfully; on the contrary the proof shews that they were both and each of them wandering at the time of the accident, and were wrongfully on a piece of land which did not belong to the owner of the horses, without any permission from the owner of the land which made them subject to be put in the pound by the pound keeper, in virtue of article 447 of the Municipal Code.

In fact, according to section 271 of the Railway Act, 51 Vict. ch. 29, already cited, it is in so many words forbidden to allow cattle to wander near a railway, unless they are in the charge of some person, and if an animal so wandering is killed by a train, the owner has no right of action against the company. Here, it must be admitted, we have a disposition sufficiently formal and categorical, and which presents no difficulty in interpretation.

Also this section 271, which has been in force without the slightest alteration since 1858 in virtue of the Act 20 Vict. ch. 12, sec. 16, from which it comes, has always been interpreted in its strict sense by all our Courts, which have always decided that the fact of leaving an animal on the public road within a distance of half a mile from a point of intersection of this road and a railroad without considering the circumstances under which it is there, constitutes wandering at large in the sense of the statute and that the statute takes away the right of action not only the case where animal so wandering at large, is killed

at the point of intersection of the railway with the public highway, but even in the case where it might be killed on the railroad outside of the limits of the public highway, although it got there by reason of the insufficiency or defective condition of the cattle guards of the company at the railway crossing.

This doctrine has always prevailed, and although the Railway Act has several times been amended, nevertheless, no alteration has been made to section 271 which is still in full force. It is in this sense that the judgment was rendered by the Supreme Court in the case of the *G.T.R. v. James*, 31 S.C.R. 420, above cited.

Our last proposition.

We submit that in the present case the respondent's horses having been found on the appellant's track without right, without being there and then under the care of some one able to take care of them, when they were beyond their owner's property, the latter has no recourse against the appellant, for he has to blame only his own gross negligence if he suffers damage, his horses being wandering in the strict sense of the word, at the time of the accident, as well towards the public as towards the appellant.

We say that the respondent is guilty of negligence and of gross negligence.

The following are some decisions cited by His Lordship the Honourable Judge Hall in the case of the *C.P.R. v. Ross*, and which we cite here in support of our contention.

(1891), *Duncan v. C.P.R.*, Chancery Div. Toronto, 15 L.N. 16.

(1891), *McKenzie v. C.P.R.*, 14 L.N. 410.

(1892), *Nixon v. G.T.R.*, 16 L.N. 59.

(1892), *Griffith v. C.P.R.*, Ont. County Court, 15 L.N. 119.

Darling v. Boston and Albany R.W., 121 Mass. Rep. 118.

Plaintiff's authorities.

Pontiac Pacific Junction R.W. Co. v. Irish, R.J.Q. 3 Q.B. 267.

Bourassa v. G.T.R., R.J.Q. 4 S.C., 361.

Dumouchel v. G.T.R., R.J.Q. 4 S.C., p. 379; 31 S.C.R. p. 426.

Nov. 1902. Bossé, J. (dissenting).—This case presents a difficult question. Our jurisprudence gives us very little guidance and the sections cited of the Railway Act as to the responsibility for damages caused by lack of a fence or by such fence being in bad condition, can help us very little.

The facts are as follows:

Fortier was the owner of a sawmill alongside the railway track; there was no station at this place, but a siding for shipping lumber. For the convenience of this business, Fortier had asked the company not to make a fence between the railway track and his land. The company had acceded to this request and Fortier's land had become practically a yard appertaining to the track, and from which the lumber, which Fortier piled there, could easily be shipped.

The plaintiff is a carter. By sufferance, but nevertheless after notice that it was dangerous and that accidents might happen, he sent his horse to pasture among the piles of timber, lumber and planks which were waiting to be shipped.

The day of the accident, Pellerin went to get his horse about the time of the arrival of one of the company's trains. He had neither bridle or halter, and taking the animal by the mane, he was about to lead him across the track when the train arrived. The horse took fright, escaped from Pellerin, and was run over by the cars. Under these conditions the company was condemned to pay the value of the horse.

As a general rule a railway company is bound to construct and keep in repair fences on each side of its track. In one sense this obligation is in the public interest, but by mutual consent it can be derogated from, and there might be, as in fact there was, an agreement between Fortier and the company, that in Fortier's interest and for the better carrying on of his sawmill, the company should not construct a fence at that point.

If in consequence Fortier had suffered some damage he would certainly be unable to claim it. Pellerin occupying by

sufferance from Fortier and sending his horse to pasture on this land, just as Fortier himself might have had one of his own animals pasturing there, cannot have any more rights than Fortier would have himself; he took Fortier's thing in the state in which it was; he turned into pasturage for his own use and by gratuitous title, Fortier's land beside the railway track, said land not being fenced, and he took it also subject to all the inconveniences and all the causes of accident which might occur.

It cannot be pretended that there is here any question of public interest, nor can it be said that Pellerin is a third party towards whom the agreement not to make a fence is of no effect.

If third parties had suffered from the absence of this fence, it is certain that the agreement between Fortier and the company could not be urged against them, but it appears to me that Pellerin enjoyed here as regards his right of action, only the personality and the rights of Fortier.

The contrary opinion would carry with it from another point of view, some peculiar consequences. Thus could not the company if condemned to damages in these circumstances, say to Fortier, it is in execution of a contract that I have made with you, and at your request that I have not placed that fence there; now I am condemned to damages because of carrying out my contract with you; it is your act, indemnify me? And Fortier would find himself paying to Pellerin the value of the horse killed in these circumstances.

From another point of view still, Pellerin appears to me also to be in the wrong. He has attempted to lead his horse across the railway track at the moment of arrival of a train, and he has neither bridle nor halter on the horse. It is indeed the custom to lead horses by the mane in an open field, or in places where accidents are not probable, but in the circumstances established in the present case, it appears to me that Pellerin did not shew the ordinary care of a *bonus pater familias*. He voluntarily exposed himself to the accident from which he suffered.

The Honourable Judge Hall shares this opinion.

OUMET, J.:—The horse killed was not wandering. The opposant had put him to pasture on the mill land, the property of Fortier, which Fortier knew and allowed. At the time of the accident the respondent was leading the horse by the mane, and was going to take the road which leads from the mill to the public highway when the train belonging to the appellant came along at full speed. The horse taking fright ran away on the track in front of the train and was killed. If there had been a fence the horse would not have been able to run on the track and would not have been killed. Therefore it is the absence of the fence and of the gate at the crossing that was the immediate cause of the accident. The amendment to section 194 of the Canada Railway Act, 51 Vict. ch. 29, has been passed for the very purpose of making the company responsible in such a case.

The appellant says that it is at the request of the proprietor and for his accommodation that the fence was not made. This is true, but the provision which compels the company to fence its road was made in the interest of the public generally and not only for a neighbouring proprietor. The latter can renounce his rights for himself, but not for the public. In the present case the respondent had no knowledge whatever that the proprietor had made such a request to the company, and was neither in his employ nor his agent; the private arrangements between Fortier and the company could not affect the respondent's recourse against the latter.

See Amer. Eng. Ency. of *Law re Fences*, authorities, vol. 12, pp. 1071 and 1072.

P. H. Côté, attorney for appellant.

J. E. Methot, attorney for respondent.

MANITOBA.]

[RICHARDS, J.]

CARRUTHERS v. CANADIAN PACIFIC R.W. CO.

(3 West L.R. 455).

Railway—Animals killed on track—Defect in fence—Knowledge—Escape of animals from adjoining land—Railway Act, 1903, sec. 237, sub-sec. 4.

Four horses, the property of the plaintiff, escaped through an open gate on to a highway, thence through an opening on to a neighbor's land, and thence through an opening in defendants' fence to the track where they were injured by one of defendants' trains.

Held, under sec. 237, sub-sec. 4, Railway Act, 1903, that the defendants were liable.

April 16, 1906, RICHARDS, J.:—

Four horses, the property of plaintiff, were kept by him in a fenced field, the entrance to which was secured by bars. The owner of a traction engine had, on one or two occasions, to plaintiff's knowledge, but without his permission, gone into the field to get water from a small lake at one of its corners. Some one, probably the owner of the traction engine, one day left the bars down without plaintiff's knowledge. The horses strayed through the opening on to a highway, thence through an opening on to a neighbour's land, and thence on to the defendants' right of way, through an opening in defendants' fence, between the right of way and the neighbour's land, and on to the defendants' track, where one of the defendants' trains killed two of them, and so injured the other two that they could not recover and had to be shot. The killing and injuries did not occur at the point of intersection of the railway with a highway.

The opening through which the horses got on to the right of way was made by defendants in connection with a farm crossing, put in by them for the owner of the adjoining land. After making the opening the section foreman applied to defendants for a gate to place in the opening. None was ever furnished, though the opening was made about two years before plaintiff's horses so got through it. Plaintiff had not received

any permission to put his horses on the land from which they strayed on to the right of way.

The case turns on section 237 of the Railway Act of 1903. No decisions interpreting it were cited and I have found none.

It seems to me that sub-section 4 of section 237 makes railway companies liable in damages where animals, after getting at large otherwise than through the neglect or wilful act or omission of their owners, or custodians, or owners' or custodians' agents, get, in any way upon the railway company's property, and are there killed or injured by the railway company's trains, elsewhere than at a point of intersection with a highway.

It is not necessary to consider here the liability where the killing or injury is at such point of intersection, or whether sub-section 4 can apply to such a case.

Under sub-section 4 it seems to me immaterial, so far as company's liability is concerned, whether the animals killed or injured were or were not lawfully on the land from which they got on to the company's property. The whole sub-section and particularly the clause beginning "unless the company," in the 6th line, seems inconsistent with any limit of liability to cases where the animals were lawfully on such adjoining land.

The owner of the adjoining land knew of the omission to furnish the gate and did not complain. It was argued that he had thereby assented to the omission and could not have recovered if his own animals had got through the opening on to the track and been injured by a train, and that plaintiff could be in no better position than the owner could.

Without discussing whether the plaintiff's rights could be limited by those of the adjoining owner as above suggested, I think the case of *Dunsford v. Michigan Central R.W. Co.*, 20 A.R. 577, shews that mere knowledge of the defect without complaint would not bar the owner's claim in such case as above supposed.

There will be judgment for plaintiff for \$470.00 with costs.

See next case.

MANITOBA.]

[COURT OF APPEAL.

CARRUTHERS V. CANADIAN PACIFIC R.W. CO.

(4 *West L.R.* 441.)

Railway—Animals killed on track—Defect in fence—Knowledge—Escape of animals from adjoining land—Railway Act, 1903, secs. 199, 237.

Four horses, the property of the plaintiff, escaped through an opening on to a highway, thence through an opening on to a neighbor's land and thence through an opening in defendants' fence to the track; where they were injured by one of defendants' trains.

Held (affirming Richards, J.), *ante*, p. 13, that under the Railway Act 1903, secs. 199, 237, sub-sec. 4, the defendants were liable.

Per Phippen, J.A., dissenting.

APPEAL by defendants from judgment of Richards, J., 3 *West. L.R.* 455, *ante* p. 13.

Plaintiff, a farmer, lived in North Cypres. In October, 1905, he lost four horses which were killed on defendants' line of railway; they were on a private crossing, and plaintiff alleged that there was no proper gate as required by law to prevent their getting on to the track. The case was tried at the Portage la Prairie assizes, before Richards, J., and a verdict was entered for plaintiff for \$470. Defendants appealed to the Court of Appeal.

The appeal was heard by Howell, C.J.A., Perdue and Phippen, J.J.A.

H. A. Robson, for defendants.

G. Barrett, for plaintiff.

After stating the facts as set out in the judgment of Richards, J., *ante*, p. 13. The learned Chief Justice proceeds.

October 22, 1906. HOWELL, C.J.A.:—A long series of decisions for a half century past in practically all the Courts of the

provinces of the Dominion have held that the various statutes up to and including 51 Vict. ch. 29, imposing duties on railway companies to fence their lines, was a duty which they owed only to the adjoining land-owners. These cases and the statutes are fully considered in two cases in this province: *Westbourne v. Manitoba and North Western R.W. Co.*, 6 Man. L.R. 553, and *Ferris v. Canadian Pacific R.W. Co.*, 9 Man. L.R. 501. In some of these cases, particularly in the Ontario Court of Appeal, eminent Judges have intimated that they follow this line of law, not because it appeals to their reason, but because of previous decisions.

The Railway Act of 1888 was amended by 53 Vict. ch. 28, and that section, it seems to me, was a step towards declaring that a railway company's duty in fencing the line could not be met by shewing that the cattle injured were trespassing on the neighbouring land from which they got upon the line.

This question came up in the province of Quebec in *Quebec Central R.W. Co. v. Pellerin*, Q.B. 12 K.B. 152, in which case it was held by a majority of the Court that an agrément between the adjoining proprietor and the railway company not to fence the line did not protect the company from damages where a horse was killed, the owner having by permission of the adjoining proprietor kept his horse on these unfenced premises. The horse was injured by wandering on the track on account of the want of a fence. In that case the majority of the Court seemed to hold that the duty to fence was a public duty which the adjoining proprietor could not relieve the railway company from performing.

This amendment of 1890 made further provision for cattle allowed by law to run at large, that is, cattle allowed to run upon or loiter upon highways, for no by-law allowing animals to run at large would permit them thereby to run upon private property with impunity. Under this amendment the case of *Fensom v. Canadian Pacific R.W. Co.*, 8 O.L.R. 688, 4 O.W.R. 373, 3 Can. Ry. Cas. 231; 4 Can. Ry. Cas. 76, was decided.

In that case cattle permitted to run at large, that is, permitted by law to pasture on or loiter on highways, wandered from a highway over Crown lands to defendants' line of railway, which the company at that point had neglected to fence, in breach of their duty. The statute under which that case was decided provided: "And no animal allowed by law to run at large shall be held to be trespassing on a place adjoining the railway merely for the reason that the owner or occupant of such place has not permitted it to be there." The railway company were held liable in that case by the Ontario Court of Appeal, the whole five Judges concurring. It is to be observed that in that case the cattle were trespassing as against the owner, for the by-law allowing them to run at large could give no right of possession to the lands of others.

In 1890 Parliament enacted that in certain cases the owner of cattle trespassing upon the property adjoining the railway line, against the proprietor of which the company was bound to fence, had a right to complain of this breach of duty.

It is apparent that the general trend of legislation is to increase the duty of the railway companies to fence their line, and I would expect to find the present Act to be more onerous in this respect than the previous one.

The statute of 1890, in my view, compelled the railway company to fence their line, not only against adjoining owners, but also against cattle allowed by by-law to run at large on the highway. Is it too much to say that the present law requires such fencing not only, as in the late statute, against animals allowed by by-law to be on the highway, but also as against all animals on a highway who wandered through an adjoining field upon the line at a point where the statute declares the company shall maintain fences?

The present Railway Act, 3 Edw. VII. ch. 58, came up for consideration recently in the case of *Bacon v. Grand Trunk R. W. Co.*, 7 O.W.R. 753, 12 O.L.R. 196, 5 Can. Ry. Cas. 325. In

that case the horse injured was at large on the highway, having got out of its pasture field without negligence on the part of the plaintiff, got upon the highway, "was frightened by the train and went up the track to the place where it was struck and killed." I gather from this that the animal went up the track because of a defective cattle-guard. The Court held the company liable under section 237, sub-section 4.

It came up again in *Arthur v. Central Ontario R.W. Co.*, 11 O.L.R. 537, 7 O.W.R. 527, 5 Can. Ry. Cas. 318. In that case the horses injured got out of hand at a water hole, where plaintiff was endeavouring to water his herd. They broke from him and ran to the intersection of the highway and the railway, and there got upon the track and were killed. A very clear judgment was written by the County Court Judge who tried the case, and that judgment was affirmed in a Divisional Court. That case simply held that where animals got upon the railway track because of a defective cattle-guard the railway company were liable unless they shewed negligence.

These two cases do not help us much in the application of this section to the present case. In this case the animals got at large, and if we assume that the railway company did not prove that it arose through any negligence of plaintiff, it seems to me reasonably clear that if they got on defendants' line at the intersection of the railway, the company would be liable. They, however, got on the line of railway by wandering from the highway upon the property of another person, and thence upon the railway track.

According to the decisions in the two cases above referred to, the railway company are liable because of their breach of duty under sub-sec. (c) of sec. 199. The duty to keep up those cattle-guards by that sub-section is a duty which the railway company owe to the public, and one would think that the duty provided for by sub-section (a) of the same section, supplemented by the clear language of sub-section (2), would equally be a duty to the public. This duty is set forth in the clearest

language, and, untrammelled by previous decisions, one might reasonably think that Parliament had in view, in imposing this duty, two objects: first, to protect the travelling public from accident; and second, to protect the owners of domestic animals from getting into a dangerous locality, just as operators of dangerous machinery are bound to protect the public by putting up guards. It might well be considered that Parliament intended to impose upon the company the duty of protecting the public, by requiring the line to be fenced so as to keep off any cattle which may have got out of hand and have wandered into a neighbouring field. In looking at the Act in this view, I have not overlooked sub-section (3) of section 199, but it seems to me it might be well said that if the cattle got out of hand and wandered on the track at a place where the company were not bound to fence by law, there would of course be no liability, but if they got on the railway line at a point where they were bound by sub-section (2) and sub-section (a) to fence, then there would be a liability.

It seems to me the important question in this case is whether or not sub-section (4) of section 237 is limited in its application to cattle which got upon defendants' railway line direct from a highway, or whether, having been at large upon a highway, they wandered across a field from the highway and got upon defendants' line of railway at a place where it was their duty to fence, and they had been negligent in keeping up the fence. In this case the horses did get upon a highway and from there into a neighbouring field, and thus on defendants' line through an opening in a fence, where they had manifestly neglected to keep a gate, and it does seem to me that if this duty to keep up the gate or fence between the neighbouring land-owners and the railway line is a duty to the public, then defendants are liable.

If the duty to fence the line under sub-sections (a) and (2) is for the benefit of the adjoining owners only, then the company and these owners can contract that these fences shall not be built, with the result that the only protection of the line

against cattle will be the cross-fences and cattle-guards at highway intersections. Land-owners are not bound to fence as against highways, yet the Railway Act contemplates that cattle and horses may be at large or out of control on highways, and in that event I cannot see what protection such fences and guards can be to the railway.

Let us look at the ordinary reading of sub-section (4) of section 237. Is it not simply and shortly expressed in the following language? "When any cattle or other animals at large or otherwise upon a highway get on the property of the company and are killed or injured by a train, the owner shall be entitled to recover unless the company establishes negligence or wilful act or omission of the owner." Then consider for a moment the provisions of section 199. It says that the company shall erect and maintain fences of a minimum height of four feet six inches on each side of the railway; such fences shall be suitable and sufficient to prevent cattle and other animals from getting upon the railway; and then follows sub-section (3), providing that at certain places the company need not fence.

If this Act with these provisions came up for consideration for the first time, I should have no hesitation in saying that a duty to the public in general was imposed on the company, and that if cattle got on the track because of the want of these fences it would not lie in the mouth of the railway company to say that there was no right of action because the cattle happened to go over ground upon which they were, as against the owners of the land, trespassers. Certainly many of the duties imposed by that section, 199, are duties the company owe to the public. Looking at the general trend of legislation, commencing with the amendment of 1890, and the broad language of sub-section (4) of section 237, it seems to me that Parliament intended to extend the liability of the railway company to fence.

With some doubt and hesitation, I think that when cattle are at large or otherwise on a highway, and escape from there to a field adjoining the railway, and from that field (although

they are there without the leave of the owner) wander upon the railway at a point where the railway company are required to fence, under section 199, and are killed or injured by a train, the company are liable.

PERDUE, J.A.:—The whole question involved in this case turns upon the consideration whether the railway company are bound to erect fences along their right of way as a public duty, or simply for the benefit of adjoining proprietors.

The Railway Act of 1868, section 11, imposed the duty upon a railway company of fencing their right of way, "if thereunto required by the proprietors of the adjoining lands." In the Consolidated Railway Act, 1879, section 16, the same words are used, making it incumbent upon a railway company to fence only when required to do so by the adjoining proprietors.

By an amendment passed in 1883, 46 Vict. ch. 24, sec. 9, the above section 16 was repealed and a new section inserted. This section made it necessary to fence where "the occupant" of the adjoining lands required the company to do so. By sub-section 2 of this new section the railway company were, in case of omission to erect and maintain fences, etc., declared liable for damages caused to animals of the "occupant" of the adjoining land.

The Railway Act of 1888 was substituted for the previously existing legislation, which was repealed by it (section 309). Section 194 of the Act provided for the erection and maintenance of fences, but left out the words found in the previous Acts providing that the fencing should be at the requirement of the adjoining proprietor or occupant. The enactment was in very general terms, and declared that when a municipal corporation or township was organized, and the whole or part surveyed and subdivided into lots for settlement, fences should be erected by the railway company. Sub-section 3 of the same section declared the liability of the company for failing to erect or maintain fences, and rendered them only liable for injury done to animals "not wrongfully on the railway."

In 1890 an amending Act was passed (53 Vict. ch. 28), by section 2 of which the above sub-section 3 was repealed and it was declared that where there has been an omission to fence and maintain fences, "and in consequence of such omission or neglect any animal gets upon the railway from an adjoining place where, under the circumstances, it might properly be, then the company shall be liable to the owner of every such animal for all damages in respect of it caused by any of the company's trains or engines, and no animal allowed by law to run at large shall be held to be improperly on a place adjoining the railway merely for the reason that the owner or occupant of such place has not permitted it to be there."

Down to the passing of the Act of 1888 it was well settled by a long line of decisions, commencing with *Dolrey v. Ontario, etc., R.W. Co.*, 11 U.C.R. 600, that railway companies were only bound under the statute to fence as against the adjoining owners. The cases decided down to that period are referred to and discussed in *Westbourne Cattle Co. v. Manitoba and North-Western R.W. Co.*, 6 Man. L.R. 553. The latter was a decision under the Act of 1888. Taylor, C.J., before whom the case was heard, was of the opinion that if the intention of Parliament was to completely change the liability of railway companies, such intention should have been expressed in plain and explicit terms. He held that under the Act of 1888 the company were only bound to fence as against adjoining proprietors. The decision in this case was approved by the full Court in *Ferris v. Canadian Pacific R.W. Co.*, 9 Man. L.R. 501. In this last case it was held that where cattle had strayed upon the land of an adjoining owner and escaped thence on to the railway track through a defective gate, the railway company were not liable for damages done to them. The evidence in this case shewed no special permission given to the owner of the cattle to allow them to be upon the land in question. It was held that in such a case the amendment of 1890 did not materially alter the law as declared in *Westbourne Cattle Co. v. Manitoba and North-Western*

R.W. Co. Ferris v. Canadian Pacific R.W. Co. was decided in 1894, and in 1904 the effect of the Act of 1890 was fully considered by the Ontario Court of Appeal in *Fensom v. Canadian Pacific R.W. Co.*, 8 O.L.R. 688, 4 O.W.R. 373, 3 Can. Ry. Cas. 231, 4 Can. Ry. Cas. 76. It was held by the unanimous judgment of the five judges who heard the appeal that a railway company could not defend themselves by saying that the cattle that were injured were trespassing on the lands from which they had gained access to the railway. Garrow, J.A., after referring to the previous legislation on the subject and the decisions thereunder, points out that it was to the state of the law as declared by those decisions that the amendment of 1890 was directed, and that it must be assumed that it was intended to change the law as so declared.

There appears, therefore, to be a direct conflict as to the effect of the amendment of 1890 between the Court of King's Bench for Manitoba and the Ontario Court of Appeal.

With the effect of *Ferris v. Canadian Pacific R.W. Co.* much shaken by *Fensom v. Canadian Pacific R.W. Co.*, we must now consider the existing legislation on the subject. This is found in the Railway Act, 1903, 3 Edw. VII. ch. 58. This is styled in the heading "An Act to amend and consolidate the law respecting Railways." It repeals all previous legislation, and furnishes not only a consolidation of the railway law, but also amends the previously existing law in many respects.

By sec. 199 of this Act a railway company are compelled to erect and maintain upon the railway, fences, gates, and cattle-guards of the description contained in the clause. Sub-section 2 provides that "such fences, gates, and cattle-guards shall be suitable and sufficient to prevent cattle and other animals from getting on the railway." Sub-section 3 excuses the railway company from fencing where the railway passes through a locality in which the lands on either side of the railway are not improved or settled.

The Act does not anywhere declare how or to whom the com-

pany shall be liable in damages for breach of the section. This is left to follow as an ordinary consequence of the breach of a statutory obligation resulting in an injury to the party complaining. The obligation to fence, etc., is expressed in the broadest and most general terms, and there is nothing in the section or in the Act to shew that the fences, etc., are only to be erected for the protection of an adjoining owner or occupant. Part of the section which provides for cattle-guards on highways, was undoubtedly passed for the protection of the general public. There is nothing to shew that the rest of the section was passed for the benefit of any particular class of persons.

Section 237 relates wholly to animals at large upon a highway, and does not, in my opinion, apply to a case like the present, where the animals get upon the railway from private property, owing to a defective fence or gate.

It appears to me that in construing section 199 the only course to be adopted is to give to the language of the section its ordinary, obvious meaning. The Railway Act, 1903, was intended by Parliament to embody and express what should be, after the Act came into force, the statutory provisions relating to railways in general, subject to extension or qualification in any special Act. Much of it is taken from the law as it previously stood, but, on the other hand, there appears to have been an intention to create new provisions as to some matters, and in these respects to change or vary the provisions previously existing. Section 199 appears to be an example of this. As the statute is an enactment of the whole law upon the subject, it should be construed according to the plain meaning of the language used, and no effort should be made to import into it a meaning taken from previous Acts, where words are used in a plain and obvious sense, and no terms are employed which require a reference to previous statutes in order to ascertain their meaning. The very fact that the section in question is framed in a new form, and that wider and more comprehensive expression is chosen, points to an intention to vary the law as it previously stood and to make the provision more general in its effect.

We should, I think, apply to this Act the same rule of interpretation as should be applied to a statute codifying and declaring the law upon any particular subject. I think the rule to be followed here is the same as that expressed by Lord Herschell in *Bank of England v. Vagliano*, [1891] A.C. at p. 144, in regard to the interpretation of the Bills of Exchange Act. He says: "I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view."

If then we ask what is the meaning of section 199, not concerning ourselves as to what was the law which it displaced, we must construe it as imposing a general obligation upon railway companies in favour of and for the protection of the general public. If that is the true meaning of the section, then it is no answer on behalf of the company to say that the animals that were injured were trespassing upon the private property from which they got upon the railway.

The whole trend of the legislation upon this subject has been to extend the obligations imposed upon railway companies in regard to enclosing their railways so as to prevent animals from getting upon them. Although the obligation to fence seems at first to have been confined to the protection of adjoining owners or occupants, it has been constantly extended and made more stringent by the later Acts. The statute of 1890 clearly shewed an intention to extend protection to others than adjoining owners in cases which fell within that statute. Is it too much to say that the statute of 1903 was intended to go further and make the obligation a general one in favour of all persons, subject only to the exceptions specifically mentioned in the Act?

I think the appeal should be dismissed with costs.

PHIPPEN, J.A.:—This action raises the neat point of the liability of a railway company under the Act of 1903 to fence for the protection of other than the lawful occupants of adjoining land.

The liability of railway companies in Canada to fence has existed by statute ever since railway construction began. The extent of this liability has constantly been the subject of judicial consideration, and it has universally been held that the Canadian Act did not impose a liability in favour of strangers to the neighbouring soil. With a full knowledge of these decisions, Parliament has from year to year amended the governing sections, but without, according to the agreed opinion of the Courts, so late at least as the Act of 1890, altering the principle of non-liability to strangers. Has the policy thus adopted been abandoned by the Act 3 Edw. VII. ch. 58, in favour of universal liability? This must be answered by a consideration principally of sections 199 and 237 of the Act.

Taken by itself, I cannot find in section 199 any such plain intention to alter the law as would justify me in supporting the trial judgment. Its language does not differ materially from that of some of the earlier statutes. It does contain an obligation in general language to fence, but earlier statutes have enacted the same obligation in almost identical language, yet Judges have not differed in holding the lesser liability.

As applicable to the effect of this section I adopt the language of Taylor, C.J., in *Westbourne v. Manitoba and North-Western R.W. Co.*, 6 Man. L.R. 553, where he is reported as saying, when considering an earlier Railway Act: "I do not think that it can be supposed the legislature intended by any such change of language as is found here to alter entirely the liability of companies and to impose upon them so much heavier burden. Yet that is what has been done, if the construction contended for by the plaintiff is the correct one. The legislature must be presumed to have known the construction put upon the former statutes by the Courts, and that under that

companies were liable to fence only as against adjoining owners. Is it then too much to say, that if the intention was to change all that, it should have been done in plain explicit terms?

“The legislature has said that where a railway is constructed . . . it shall erect and maintain fences along the line, without saying for whose use or benefit these fences shall be erected and maintained. The uniform decisions of the Courts have been that the liability to fence, imposed by the various statutes, is only as against adjoining owners or occupants. As the legislature has not said that the liability under the present Act shall be wider, and for the benefit of another class, it must be assumed that they intended to impose the liability for the benefit of those held by the Courts entitled to it.”

The respondent's counsel contends that, even if section 199 does not alter the law, sub-section 4 of section 237 itself imposes a general liability covering this case. Sub-section 4 reads in part as follows: “4. When any cattle or other animals at large upon the highway or otherwise get upon the property of the company and are killed or injured by a train, the owner of any such animal so killed or injured shall be entitled to recover the amount of such loss against the company,” etc., etc.

Counsel for the appellants reads this section: “When any cattle or other animals at large upon the highway or otherwise upon the highway,” while the respondent's counsel construes “otherwise” as the equivalent of “elsewhere.”

The section as it stands is undoubtedly ambiguous. Something must be supplied or altered to enable one to give it a full meaning. I adopt the construction of the appellants' counsel. To do otherwise would be to make the test of liability solely and only (apart from negligence by the owner or agent as a defence) whether the animal was or was not at large. If at large the question of fencing is of no moment. All that plaintiff need allege and prove is that his animal while at large “upon a highway or elsewhere” was killed by a company's train. That the company had fenced in strict compliance with the Act, that

the animal by its own viciousness had borne down the statutory fence, that the animal was at large in a district where the railway company were not bound to fence, would be immaterial, for under this construction the statute is positive and explicit, that the animal, being at large and having been killed, must be paid for.

It does not appear to me that Parliament intended to adopt any such unusual law, to work such an absolute change from the long existing and well understood order of things, by the insertion of one word only and that of ambiguous meaning. Rather does it seem that Parliament was dealing only with animals at large upon the highway. With the *Nixon* case, 23 O.R. 123, before it, it intended to provide that railway companies should not avoid liability for animals killed upon the track escaping thereon by reason of a defective cattle-guard from a highway upon which they had been at large, by setting up against the owner the half-mile highway clause.

Then it was suggested that if there was a direct and explicit statutory liability for animals at large upon the highway killed by a train, the ingenuity of the railway lawyer would suggest that no liability was to be implied from the statute in the case of animals not at large (i.e., in charge of the owner or agent) walking from the highway to the track over a defective guard. Hence the insertion of "otherwise" to cover all cases of animals upon the highway, "at large upon the highway or otherwise upon the highway."

I have ventured somewhat into the realm of speculation to explain the apparent ambiguity of this clause. Yet, apart entirely from such imaginings, I cannot bring myself to hold that Parliament intended, by the insertion of a word, to revolutionize an important branch of the law and to impose so huge a liability upon railways, the responsibility for which would not appear to involve considerations of obligations neglected or statutory requirements violated. If such a liability there be, it must be created by language both apt and certain. This has not been done.

I would allow this appeal with costs, including costs of hearing.

Appeal dismissed with costs; Phippen, J.A., dissenting.

Note the defendants have appealed from this judgment to the Supreme Court of Canada, but the appeal has not yet (March, 1907) been disposed of.

MANITOBA.]

[DUBUC, C.J.

SHELLENBERG v. CANADIAN PACIFIC R.W. Co.

(3 West L.R. 457).

Railway—Animal killed on track—Absence of fence—Liability—Railway Act, 1903, sec. 199, sub-sec. 3—Lands “not improved or settled, and inclosed.”

The railway line of the defendants passes through the land of the plaintiff which is owned, occupied, and cultivated by him. There is no fence whatever on or around plaintiff's land, nor on either side of the railway. Plaintiff's cow was pasturing on his land south of the railway when she ran on the track and was killed.

Held, that the lands adjoining the railway must not only be improved or settled but also enclosed before the company is required to erect fences under section 199 of the Railway Act, 1903.

Action to recover damages for a cow of plaintiff's killed by one of defendants' trains.

H. S. Lenon, for plaintiff.

A. S. Bond, for defendants.

April 24, 1906. DUBUC, C.J.:—The railway line of defendants passes through the north-west quarter of section 2, township 3, range 5 west of the principal meridian of the province, owned, occupied, and cultivated by plaintiff. There is no fence whatever on or around plaintiff's land, nor on either side of the

railway on said section. Plaintiff's cow was pasturing on his land south of the railway when she ran on the track and was killed.

Plaintiff contends that defendants were bound to have a fence erected on each side of their railway line, and that their failure to do so renders them liable for the loss of his cow.

Defendants contend that, as plaintiff's land was not inclosed, there was no such obligation imposed on them.

The point raised turns upon the construction of sec. 199, sub-sec. 3, of the Railway Act, 1903. The section deals with the duty of the railway company to erect and maintain fences, gates, and cattle-guards on each side of the railway. Sub-section 3 reads as follows: "Whenever the railway passes through any locality on which the lands on either side of the railway are not improved or settled, and inclosed, the company shall not be required to maintain such fences, gates and cattle-guards unless the Board (of Railway Commissioners for Canada), otherwise orders or directs."

It is admitted that no such order or direction has been made by the Board. And the evidence shews that at the time of the accident in October, 1905, the land was occupied and improved; but that there was no fence whatever on or around the quarter section, nor on or around any portion of said section 2. It shews also that there is no fence on sections 1 and 3 south of the railway line.

What is the meaning of the provision referring to lands on either side of the railway which are "not improved or settled, and inclosed?"

The point was raised before my brother Richards in *Dreger v. Canadian Northern R.W. Co.*, 1 West. L.R. 126, 15 Man. L.R. 386. In that case there was a defective fence erected by the railway company, and, owing to that defect, plaintiff's cow got on the right of way of defendants and was killed. The Judge referred to two possible interpretations which might be given to that provision, and, as he considered that defendants under

either of them would be liable, he did not feel called upon to decide between them. One of those interpretations implies that the text has to be somewhat modified or altered by removing the comma between the words "settled, and inclosed" and inserting it between the words "improved or settled," making it read that the company should fence when the lands are either (1) improved, or (2) settled and inclosed. This is sometimes done by the Courts when the grammatical sense would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument or statute to be construed: Broom's Legal Maxims, 7th ed., p. 426. But such modification or alteration is not resorted to when the language used is susceptible of a reasonable grammatical construction. Here, taking the phrase as it stands, it seems that it can receive a reasonable construction without modifying or altering the text by a change in the punctuation.

We have the words "not improved or settled," and then, separated by a comma, the words "and inclosed." That clearly means that the land need not be both improved and settled to impose upon the company the obligation of erecting and maintaining fences; it is sufficient if they are either "improved" or "settled," but the words "and inclosed," which follow and are separated by a comma from the preceding words, shew that they are intended as a separate and independent requirement. The whole sentence, read together, means that the land, whether improved or settled, must be inclosed. The natural and grammatical sense then is, that the company is required to fence when the lands on either side of the railway are either "improved and inclosed," or "settled and inclosed," and I do not see anything absurd, repugnant, or inconsistent with the rest of the provisions in that construction.

The other interpretation would be that if the lands are improved, though not settled or inclosed, the company would be bound to fence; while if they were only settled or occupied but not inclosed, there would be no such duty on the company.

The fencing is evidently required for the purpose of protect-

ing the animals of persons who are owners of adjoining lands and preventing them from getting on the railway track. Does it not seem more necessary and more reasonable to have a fence erected on the side of the railway line when persons are living on the adjoining lands, and are supposed to have their cattle with them, than where the lands are merely cultivated or otherwise improved without any one residing on them? Persons settled on adjoining land may, or may not have cattle or horse. If they have no animals, they may not see the necessity of fencing their land; if they have, they would naturally erect fences to inclose their land. If an owner incloses his land, or erects fences on it, the railway company would understand that the settler has, or intends to have, cattle which would require protection, and that their railway line would require to be fenced. But, if the land is not inclosed, if there is no fence at all on or around it, that would look like an indication that the settler is not expected to have cattle, and that no fence is required. May we not suppose that such was the view taken by Parliament when it framed the provision in such a manner as to make it obligatory on the railway company to erect fences when the adjoining lands are either "improved and inclosed," or "settled and inclosed," and to dispense it from such duty when the land is not inclosed? As such a grammatical sense, neither absurd nor repugnant nor inconsistent with the rest of the clause, can be attributed to the provision, I do not think that the text should be modified or altered in order to give it a different but clearly not more reasonable meaning.

In my opinion, the action should be dismissed with costs.

NEW BRUNSWICK.]

[CARLETON, Co. Ct. J.
[FULL COURT.]

DAIGLE V. TEMISCOUTA R.W. Co.

(37 N.B.R. 219).

Railway Act, 1903—Stat. of Can. ch. 58—Cattle straying on track—Liability of company for killing—Negligence—Meaning of "otherwise" in sec. 237, sub-sec. 4.

Cattle being pastured in common by the occupiers of improved lands bordering on the defendant company's railway found their way to the track, and were killed by a passing train of the defendant company. It was proved that the defendants' fence along the common pasture was defective, that the company had notice of the defect and neglected to repair it, but there was no evidence as to how the cattle got on the track. *Held*, that under the Railway Act it might be inferred that the cattle found their way to the track through the defendants' defective fence, and a verdict for the plaintiff should have been sustained.

Sub-section 4 of section 237 of the Act provides that when any cattle or other animals at large upon the highway or "otherwise" get upon the property of the company and are killed or injured by a train, the owner shall be entitled to recover for the loss or injury from the company, unless they shew the negligence or wilful act or omission of the owner.

Held, that the word "otherwise" means "otherwise at large," and not otherwise at large in a place *ejusdem generis* with a highway.

APPEAL from the order of Carleton, J., Judge of the Mada-waska County Court, setting aside a verdict for the plaintiff for \$50, and ordering a nonsuit to be entered.

The action was brought to recover damages for the killing of one cow and the injury of another by the defendant railway company who operate a railway running through the farm lands of some of the inhabitants of that section of the country where the damage was done. Cultivated lands between the railway and the river, at the point in question, were being pastured in common by the joint occupiers of the lands. This common pasture was inclosed by fences on two sides, and by the railway and the

river respectively on the other two sides. Towards evening of the day on which the cow was killed, the plaintiff's cows were lawfully turned out to pasture on this common. Within a few hours of their being so turned out they had found their way to the railway track, and a train of the defendant company passing along did the damage complained of. There was no evidence as to how the cows got on the track. It was, however, proved that the railway fence along this common pasture was in a bad condition, and that a gate placed there originally by the railway company had become quite out of repair; that the company had been requested to put in a new gate and had neglected to do so.

On the application to the Judge of the Madawaska County Court to set aside the verdict for the plaintiff and enter a non-suit or order a new trial, the following judgment was delivered:

Nov. 2, 1905. CARLETON, J.:—This case presents several intricate questions for solution. Under the interpretation given by the Courts to the Railway Act, 1888, railway companies were obliged to maintain sufficient fences against injury to adjoining property holders, but not against trespassers. By the Act of 1890 this was extended to protect the owner of an animal getting on the track "from an adjoining place where, under the circumstances, it might properly be." This section is omitted from the Railway Act, 1903, and in substitution thereof sec. 237, sub-sec. 4 has been enacted.

The law of 1903 is more specific than its predecessors as to the manner of erection, quality and maintenance of fences, gates and cattle-guards. It provides that the minimum height of fences be four feet six inches, for swing-gates at a like height, for cattle-guards on each side of the highway, for the sufficiency of such fences, gates and cattle-guards, and for cases where the company is exempt from statutory duty of erecting and maintaining them.

The last (sub-sec. 3 of sec. 199) is applicable to this case. It reads: "Whenever the railway passes through any locality in which the lands on either side of the railway are not improved

or settled and inclosed the company shall not be required to erect and maintain such fences, gates and cattle-guards unless the Board otherwise orders or directs."

From this it is clear that it is not incumbent on the company to provide and maintain fences unless the lands on either side of the railway are improved or settled and inclosed. That is, they must be improved and inclosed, or settled and inclosed: See *Phair v. Canadian Northern R.W. Co.*, 6 O.W.R. 137, 5 Can. Ry. Cas. 334.

The evidence in the case under consideration is that the land from which it is alleged the cattle strayed upon the railway was a common, but we are left entirely in the dark as to whether or not it was inclosed. Only on one point are we clear, and that is that there were no division line fences between the respective owners of the adjoining land.

This point was not raised at the trial or the argument, but it is very material, and is one that should have been submitted to the jury. Upon this ground, if there were none other, I should order a new trial that it might be properly determined, but it appears to me that there is at least another which in itself is fatal to the plaintiff.

Referring now to sec. 237 (the section substituted for sec. 194 of the Act of 1888 amended by the Act of 1890), this section prohibits horses, sheep, swine or cattle being permitted to be at large on any highway within a half mile of its intersection with a railway at rail level unless in charge of a competent person, provides for the impounding of cattle so at large, negatives the right of action by the owner when cattle are killed or injured while at large contrary to the provisions of this section, and concludes by affirming that evidence of negligence shall not be presumed against the owner.

The plaintiff's sole right to maintain his action is based on the last mentioned provision. The language of sub-sec. 4 of sec. 237 is: "When any cattle or other animals at large upon the highway or otherwise, get upon the property of the company and

are killed or injured by a train, the owner of any such animal so killed or injured shall be entitled to recover the amount of such loss on injury against the company in any action in any Court of competent jurisdiction, unless the company, in the opinion of the Court or jury trying the case, establishes that such animal got at large through the negligence or wilful act or omission of the owner or his agent or of the custodian of such animal or his agent; but the fact that such animal was not in charge of some competent person or persons shall not for the purposes of this sub-section, deprive the owner of his right to recover."

The critical words, it will be noticed, are "at large upon the highway or otherwise." Were the killed and injured animals in this case at large? I think not, they were being pastured on a common. At large means straying without an appointed place, and under no guidance and control. They were not at large upon the highway; they were not even, as far as we know, at any time upon the highway. Then what is meant or covered by the words "or otherwise?"

If the doctrine of *ejusdem generis* applies, then the case at bar does not fall within the section. But does it? Is the difficulty I have to meet. "When I find the words 'or otherwise'" remarks Jessel, M.R., in *Lowther v. Bentinck*, 44 L.J. Ch. 197, "I am bound to say I don't know what is *ejusdem generis*." Pollock, B., in *Monk v. Hilton*, 46 L.J.M.C. 163, defines it as being of the same general character as is indicated by the earlier words of the section. Thus the words "pretending to tell fortunes by palmistry or otherwise to deceive" were held not to cover deception by spiritualism.

"Where a statute or other document enumerates several classes of persons or things, and immediately following and classed with such enumeration the clause embraces 'other' persons or things, the word 'other' will generally be read as 'other such like,' so that the persons or things therein comprised may be read as *ejusdem generis* with, and not of a quality superior

to, or different from, those especially enumerated": Stroud's Jud. Dic. (1st ed.), 542.

The division heading of sec. 237 is "animals at large." The main section is prohibitory of their being on the highway only; the next authorizes the impounding of them when at large on the highway, though the word "highway" is not used in sub-sec. 2; sub-sec. 3 likewise, without using the word "highway," is applicable only to injuries caused by reason of the cattle being on the highway. It is only in sub-sec. 4 that the words "highway or otherwise" are used.

I am constrained to the opinion that if parliament had intended to protect the owner from all conceivable means of cattle getting on the road—through houses, barns or erections built on the railway line, or even over the top of them—it would have used definite and comprehensive language for the purpose. It appears to me that "or otherwise" here must be read as *ejusdem generis*; that is to say, or otherwise of a like kind, such as from roads that are not technically highways, by-roads and private roads, and perhaps even farm crossings.

But because that conclusion is reached it does not necessarily follow that the plaintiff has no right of action. I subscribe to the general principle, that, where private injury results from a breach of a statutory obligation, a private right of action rests in the person injured. But this, under the decisions upon the Act of 1888, can only be had by the adjoining property holder and not by the trespasser. And the plaintiff, I take it, if he join with others in pasturing his cattle in a field "improved or settled and inclosed" would not be a trespasser, though he might not be the owner of the soil, and would be entitled to recover any damages for the wrong he has sustained. That the cattle got on the track from a common of some kind, and that one of them was eventually killed and another seriously injured at a distance quite apart from where they were placed at pasture, can not be gainsaid. How did they get on the track? From the common, by reason of the defective fencing, says the plaintiff. But where is the evidence of it? Nobody knows how they got

there. Mrs. Nadeau says they must have gone out through Daigle's gate. If they did, then Daigle is in default and liable, under sec. 201, to prosecution for leaving his gate open, and under that section, as well as sec. 200, he has no right of action. If they got on from the adjoining holder's land, then no action can be successfully maintained. But, as I say, we are left entirely in the dark as to how the cattle really got on the track, but are asked to assume, or presume, that it was by the way of an insufficient and defective fence on the common.

It may have been through Daigle's gate, it may have been through the defective fence of the neighbour, it may have been from the highway, it may have been under a culvert, as in *Grand Trunk R.W. Co. v. James*, 31 S.C.R. 420, or in any other way that one can imagine, and our imagination or the imagination of a jury is to be taken as conclusive evidence of negligence against the defendant company. It appears to me that the burden of proof is elsewhere. I think the plaintiff, for the reasons given, must be nonsuited, and with costs.

From this decision the plaintiff appealed.

Nov. 21, 1905. *LaForest* now supported the appeal. The County Court Judge decided that there was no evidence that the land was cultivated and inclosed or settled and inclosed, or that the cattle were at large on the highway, therefore under the Railway Act we were bound to prove that the cattle got on the track through negligence of the defendants. I say there is undisputed evidence that the common pasture was inclosed on two sides, and the river was in the rear and the railway in front. It is true there were no line fences between the parties using this common pasture, but that is not necessary if the whole pasture was inclosed. On the principal of the case of the *New Brunswick R.W. Co. v. Armstrong*, 23 N.B.R. 193, the defendants would be bound to prove that the lands were not improved to bring themselves within the exception in the Act. There was sufficient evidence to justify the jury in concluding that the cows got on the

track through the defendants' defective fence. (Hanington, J.: Did not Judge Carleton decide that the company were not liable because the cows did not get on the track from a highway?) Yes, under sub-sec. 4 of sec. 237. If cattle are killed or injured at a place where a company has failed to fence or maintain a sufficient fence the jury are justified in presuming that they entered upon the track at that place: Wood's Railway Law, sec. 422.

J. M. Stevens, K.C., contra. There was no evidence of negligence. All that the plaintiff proved was that the cattle were found killed on the company's track. (Landry, J.: There was evidence that the railway fence was defective at or near the point of killing.) There is no evidence whatever that the cows got on the track through the defendants' fence. It is quite consistent with the evidence that they got on through the negligence of the plaintiff in leaving his gate open: *Falconer v. European & N.A. R.W. Co.*, 14 N.B.R. 179. The only evidence is that one cow was found killed and one injured on the defendants' line of railway. (Gregory, J.: That, with the fact that they were being lawfully pastured at or near the point of killing, and the fact that the defendants' fence was defective, is sufficient to sustain the verdict.) The Canadian Railway Act, 1903, has restored the law as it was previous to 1888. The law is now, as laid down in *Ricketts v. East & West India Docks*, 12 C.B. 160, that railway companies are not liable to the owners of cattle killed on their tracks unless they belong to adjoining property owners and escape owing to the company's neglect to fence. (Landry, J.: That is this case. The cows belonged to an adjoining property owner, and there is evidence for the jury that they escaped owing to an insufficient fence.) The killing was not at a point within the boundary of the plaintiff's property. (Landry, J.: It was at a point where they were being lawfully pastured.) It should have been shewn that they were being pastured with the license of owner of the adjoining property. Where cattle are pasturing on lands adjoining the railway without the owner's

permission, and escape thence to the track and are killed or injured, the owner can not recover: *MacMurchy & Denison Can. Ry. Act*, 1903, 309; *Ferris v. C.P. R.W. Co.*, 9 Man. L.R. 501, *Fensom v. C. P. R.W. Co.*, 4 Can. Ry. Cas. 76. Sub-section 4 of sec. 237 does not apply, for the cattle were not at large on the highway. (McLeod, J.: What meaning do you give to the word "otherwise?") Otherwise on the highway; that is, in charge upon it: *MacMurchy & Denison Can. Ry. Act*, 455. To entitle the plaintiff to recover it must be proved that the land was improved or settled and inclosed; that the cattle had a right to be where they got on the track, and that the defendants' fence was defective.

LaForest, in reply. It was proved that the killing was at a point where the cows were being lawfully pastured, and that defendants' fence was defective at or near that point.

Cur. adv. vult.

1905, Nov. 25th. The judgment of the Court (TUCK, C.J., HANINGTON, LANDRY, McLEOD and GREGORY, JJ.), was now delivered by

LANDRY, J. (after stating the facts as before set forth):— There was quite sufficient evidence from which to assume and infer that the cows found their way upon the railway through the defendants' defective fence or gate. The statute makes it obligatory on the railway company to keep up fences where the road runs through improved lands: *Canada Railway Act*, 1903, ch. 58, sec. 199. Here defendants had failed to do so. The cattle had a right to be where they were pasturing, and it was through no fault of the plaintiff or his agent that they strayed upon the track of the defendant company.

The learned County Court Judge ordered a judgment to be entered for the defendants on his interpretation of the meaning of sub-sec. 4 of sec. 237 of the *Railway Act*, 1903: (Cited, ante). In this case the cattle were not at large; they, therefore, got upon

the track from a place where they had a right to be, and not from such a place that could be designated as at large. Hence sub-sec. 4 does not apply. Besides the meaning of the word "otherwise" in sub-sec. 4, can not be, in my opinion, the one given to it by the learned judge. That word "otherwise" there must be read "otherwise at large," so the sub-sec. would read: "When any cattle or other animals at large upon the highway or otherwise at large get upon," etc.

The defendant company is, therefore, responsible for the injury done, and the appeal must be allowed with costs.

BARKER, J., took no part.

Appeal allowed with costs.

NEW BRUNSWICK.]

[SUPREME COURT.

LIZOTTE v. TEMISCOUTA R.W. Co.

(37 N.B.R. 397).

Railway act, 1903—Damage to trespassing cattle—Liability of company—Defective fence—Negligence—Burden of proof.

A railway company is liable for damages for killing a cow which was at large on the highway with the knowledge of the owner contrary to the Railway Act, 1903, and which strayed from the highway to the land of D., and from there to the railway track through a defective fence which the defendant company were obliged to maintain.

The company are liable for damage done to the land of an adjoining owner by cattle of a neighbour trespassing by reason of a defective fence which it was the duty of the company to maintain.

THIS action was tried before Carleton, J., at the Madawaska County Court in July, 1905. The declaration contained two counts, the first for damage for a cow killed by the defendants' train, and, second, for damage done by cattle of a neighbour trespassing on the plaintiff's land through a defective fence of the defendant company. The railway passes through the parish of Madawaska where the plaintiff lives. In the month of Octo-

ber, 1904, plaintiff's cattle were pasturing in his field which was sufficiently enclosed. Without the neglect, wilful act or omission of the plaintiff (as the jury found) the cattle escaped from the pasture and were at large on the highway where the plaintiff saw them, but made no effort to get them back into the pasture or prevent them from being at large on the highway. The cattle strayed along the highway and on to the land of Charles Dionne. The cow in question went from the land of Dionne through a defective fence of the defendant to the railway track, where it was killed by a locomotive of the defendants. It was also proved that the railway fences across the plaintiff's land, through which the defendants' railway passes, were in a very bad condition during the spring and summer of 1904, and, on two occasions, cattle at large on the line of railway strayed on to the plaintiff's land and did damage. In answer to questions submitted, the jury found that the cow got on the defendants' track from a neighbour's land through a defective fence; that the cattle got at large on the highway without the neglect or wilful act of the plaintiff, but that he was guilty of negligence in allowing them to continue at large, and that the cow did not get at large on the railway through the negligence or wilful act of the plaintiff. They assessed the damage for killing the cow at \$25, and the damage on the trespass in the second count at \$3. A verdict was entered for the plaintiff for \$28. On an application of the defendants to the County Court Judge, he set aside this verdict and ordered a verdict to be entered for the defendants, holding that under section 237 of the Railway Act, 1903, which is as follows:

"No horses, sheep, swine or other cattle shall be permitted to be at large upon any highway, within half a mile of the intersection of such highway with any railway at rail-level, unless such cattle are in charge of some competent person or persons, to prevent their loitering or stopping on such highway at such intersection, or straying upon the railway."

2. Provides for impounding cattle so at large.

“3. If the cattle of any person, which are at large contrary to the provisions of this section, are killed or injured by any train, at such point of intersection, he shall not have any right of action against any company in respect of the same being so killed or injured.”

“4. When any cattle or other animals at large upon the highway or otherwise, get upon the property of the company and are killed or injured by a train, the owner of any such animal so killed or injured shall be entitled to recover the amount of such loss or injury against the company in any action in any court of competent jurisdiction, unless the company, in the opinion of the Court or jury trying the case, establishes that such animal got at large through the negligence or wilful act or omission of the owner or his agent, or of the custodian of such animal or his agent; but the fact that such animal was not in charge of some competent person or persons shall not, for the purposes of this sub-section, deprive the owner of his right to recover,” the plaintiff could not recover on the first count, as he had been guilty of negligence in allowing the cattle to be at large on the highway; he could not recover upon the second count, because the damage was too remote, and the defendant company were only bound to fence against injury to the plaintiff's cattle, and not against trespass to his land by his neighbours' cattle. From this judgment this appeal is taken.

1905, November 21st. *LaForest*, now supported the appeal. The verdict was properly entered on the findings of the jury, and should not have been set aside by the Judge in the court below. It is the duty of the company under the Act of 1903, to fence against the public and not against adjoining owners only, as companies are obliged to do under the English Act, and were obliged to do under the Canadian Acts up to 1903. For this reason the English authorities, and, many of the Canadian cases which at first sight seem to be in point, have no application to the case before the Court. As against the defendants, the cow

was lawfully pasturing, and, as they failed to keep up a proper fence between the pasture and the railway, the company are liable under sub-sec. 4, even though the plaintiff was guilty of negligence in allowing the cattle to remain at large on the highway: *Fawcett v. York and N. M. R.W.*, 16 Q.B. 610; *Radley v. L. & N. W. R.W.* 1 App. Cas. 754; *Smith v. Niagara and St. Catharines R.W.* (1905) 9 O.L.R. 158. Plaintiff is entitled to recover on the second count. The company are bound to fence all settled and enclosed lands, and are liable for any damage arising from their neglect to do so: *Levesque v. N.B. R.W.*, 29 N.B.R. 588.

J. M. Stephens, K.C., contra. The jury having found the plaintiff guilty of negligence, the verdict was properly entered for the defendants on the first count. The liability of railway companies under sec. 199, relating to fencing, is considered in MacMurchy and Denison's Canadian Railway Act, 1903, commencing at page 308, and their liability under sec. 237 for injury to animals at large in the same work, commencing at page 451. Sub-sec. 2 of sec. 199 shews that railways are only liable for cattle on the railway. The duty to fence has nothing to do with protecting adjoining owners from trespass by a neighbour's cattle. The remedy for an injury of that kind is against the owner of the trespassing cattle: *Levesque v. The N. B. R.W.* was decided under a local Act, and does not apply; Abbott's Railway Law of Canada, 399.

Cur. adv. vult.

Feby. 14, 1906. The following judgments were now delivered:

TUCK, C.J.:—I see no objection to the verdict found by the jury. The County Court Judge rested his decision on the construction to be placed on sec. 237 of the Railway Act, 1903. In referring to the verdict of the jury, where they found that it was an act of negligence for the plaintiff to

allow the cattle to be at large on the highway, and found also that the cow which was killed did not get at large on the railway through the negligence or wilful act or omission of the plaintiff, the Judge says that these findings are easily reconciled, and further, he says, that the jury do not find that the cattle or particular cow that got killed got on the track through the negligence or wilful act or omission of the plaintiff, yet on his construction of the section, he holds the plaintiff is not entitled to recover, and gives judgment against him. In that I differ, for I think that the damage was the result of the defendant's neglect to keep up proper fences, as it was by law bound to do, and was not the consequence of the plaintiff's act in allowing the cattle to be at large on the highway.

The right of the plaintiff to recover damages done to his crop by other people's cattle getting on his land from the railway, through defective railroad fences, presents a more difficult question. I am not so sure as to this. The defendant's contention is that the remedy, if any, is against the owner of the cattle and not against the railway. On the whole, however, I think that the verdict of \$28 should be restored, and the appeal be dismissed with costs.

LANDRY, J.:—In this case the plaintiff claims damages against the defendant railway company for the wrongful killing of a cow, and for an additional trespass to his land by cattle that found their way to and on his premises by reason of defective railway fences of the company. The jury found a verdict for the plaintiff of \$28, being \$25 for the wrongful killing of the cow, and \$3 for the trespass to his land.

On appeal to the Judge of the County Court his honour, the Judge set aside that verdict and ordered judgment for the defendant company. This is an appeal from the decision of the learned County Court Judge.

The jury found that the plaintiff's cow, which was killed by an engine on the railway, was seen by him on the public high-

way, and, as he did not look after her then, pronounced that circumstance negligence on the part of the plaintiff. They found, however, that the cow from being on the highway, and after this act of negligence by the plaintiff, found her way on a neighbour's field lying next to the railway, and, while pasturing in that field, got upon the railway track through defective fences of the defendant, and then got killed.

It seems to me that the liability of the defendant in this case depends upon the interpretation placed on sub-sec. 4 of sec. 237 of the Railway Act of 1903. The liability of the defendant, therefore, as to the cow, depends upon the fact as to whether the cow got upon the track through the negligence, wilful act or omission of the plaintiff. When upon the highway the cow, not being in charge of any person, was, I believe, at large contrary to the Railway Act, and had she strayed from there directly on the track where she was killed, her getting on the defendant's property would have been through the negligence of the plaintiff, and, therefore, the defendant would not be liable; but the cow found her way on the track from a field where, perhaps, she could not (though I have some doubts as to that) be considered at large. If while in that field she was not, under the circumstances, at large in the sense of the word "otherwise" in the 4th sub-section, which I take means otherwise at large than at large on the highway, within half a mile of the intersection of said highway with the railway, the defendants are responsible.

In answer to a question left to them, the jury found that the cow had got upon the railway without negligence of the plaintiff. The facts therefore found would be, that the cow while on the highway was there through the negligence of the plaintiff, but her getting to the track from the field was through no negligence of his.

The two findings do not seem quite in logical accord; yet, I am not prepared to say that the finding of the jury as to the absence of negligence on the part of the plaintiff in the cow getting on the track, is not correct. I, therefore, differ from the conclusion reached by the learned County Court Judge.

I believe the \$3 damages for trespass on the land of the plaintiff should not have been disturbed. The appeal should, therefore, be allowed, and the verdict restored to the plaintiff.

HANINGTON, J.:—I agree with the judgment of the Chief Justice.

BARKER, McLEOD and GREGORY, JJ., took no part.

Appeal allowed with costs, to be remitted to the court below to set aside the order setting aside the verdict for the plaintiff, and ordering a verdict to be entered for the defendants and to restore the verdict for the plaintiff.

ONTARIO.]

[SNIDER CO. J.

FLEWELLING v. GRAND TRUNK R.W. Co.

[DIVISIONAL COURT.

(Unreported.)

Railway—Animal killed by fall from bridge—Defective fence—Negligence.

The plaintiff was the owner of a farm adjoining the defendants' railway. The tenant of the plaintiff made an opening in the railway fence without the knowledge of the defendants through which a few hours after the plaintiff's horse escaped on to the railway, where it was killed by falling from a bridge:—

Held, that the defendants were not liable for the act of a third party (the tenant) in making an opening in the fence.

THE facts of this case are fully set out in the judgment of the learned County Judge.

H. H. Robertson, for the plaintiff; cited,—

Can. Ry. Act (annotated), p. 313.

Bacon v. Grand Trunk R.W. Co., 12 O.L.R. 196, 5 Can. Ry. Cas. 323.

Holmes v. North Eastern R.W. Co., L.R. 4 Ex. 254.

Groves v. Wimborne (1898), 2 Q.B. 402.

Rodgers v. Hamilton Cotton Co., 23 O.R. 425.

Braddeley v. Earl Granville, 19 Q.B.D. 423.

J. W. Nesbitt, K.C., for the defendants, cited,—

Studer v. Buffalo & Lake Huron R.W. Co., 25 U.C.R. 160.

McMichael v. Grand Trunk R.W. Co., 12 O.R. 547.

Billing v. Semmens, 7 O.L.R. 340.

Can. Ry. Act (annotated), pp. 312 and 313.

McKellar v. Canadian Pacific R.W. Co., 14 Man. L.R. 614, 3 Can. Ry. Cas. 322.

Young v. Erie & Lake Huron R.W. Co., 27 O.R. 530.

June 12, 1906. SNIDER, J.:—The facts here are pretty clear, —there is not much doubt about the facts of the case, but upon them, however, the correct judgment to enter is not as clear to my mind.

The plaintiff owned a field lying alongside of this railway siding, upon which cars were put to be loaded next to this fence on that side. Being convenient to the track, the firm of Myles & Son rented it from him for a year to pile cordwood on, which they were buying, along that fence just at the side of the siding, inside the field, with the purpose of removing it, as they wanted it from time to time, to Hamilton or to the market.

To remove it they sent their agent, Nelson, and his men to load it from the plaintiff's field, and he, in order to remove the fence which was the only thing between the woodpile and the car on the siding, went to the man at the station, the section foreman—it is not a station of any moment, at which there is a station agent, the section foreman looks after all there is to do there—it being just a little stopping place on the road. That section foreman, as has been shewn here by the evidence, has no authority over the fences, other than it was his duty to repair them whenever it was necessary. He could not give permission to take them down, but he did supply a chisel and a hammer to this man, the

agent of the tenant of the plaintiff, to take down a panel of the wires through which to take the wood from the pile and put it on the cars just over this fence. That went on for a year and the wood was not all gone, and Myles & Son asked the plaintiff, who was there and who knew what was going on, to give them six months more to take away the rest of the wood and he did so. Afterwards when the plaintiff wanted to use this field for pasture, the wood still being there, he asked the railway to fasten the fence up, that is, the opening of the panel of the fence. The railway agent went accordingly and nailed boards on posts and wired the fence—he nailed these boards to the posts at each end and fastened the hole up sufficiently.

It is not alleged at all that as long as that panel remained in its place, that the fence was not all right, it was sufficiently high, and the only trouble was that in the plaintiff's tenant, Myles & Son, came along to take some more of the wood out, and the plaintiff turned his horses in the field that night just the same as usual. Some time during that evening, during the next few hours, the jury find that this Nelson, the agent of the plaintiff's tenant, took this out and set it aside in order to load some more of this wood. There is no evidence of any knowledge or communication on the part of the railway, or asking their consent, they knew nothing of it at all. The horse got out at once or within a few hours, sometime in the night.

Now, my difficulty is whether the agent of the plaintiff's tenant in the course of the business which the plaintiff knew he was doing when he saw the pile of wood there, and which he had been doing for a year and six months, when he took out the panel and made the fence, which was sufficient, unsufficient for a few hours during which time the horse got out and was killed, would make the defendant liable. The jury have found the facts are so, and it seems to me it would be an injustice to say that the defendants are liable. I do not think they are liable for the accident, and I think the correct judgment to enter is for the defendants upon these answers.

October 10, 1906. From this judgment the plaintiff appealed to a Divisional Court composed of Falconbridge, C.J., K.B., MacMahon and Teetzel, J.J.; the same counsel appeared. At the conclusion of the argument the Court dismissed the appeal with costs.

NOTES.

Railway Fences and Cattle Guards.

The cases of *Quebec Central R.W. Co. v. Pellerin*; *Schellenberg v. Canadian Pacific R.W. Co.*; *Carruthers v. Canadian Pacific R.W. Co.*; *Daigle v. Temiscouta R.W. Co.*; *Lizotte v. Temiscouta R.W. Co.*, and *Flewelling v. Grand Trunk R.W. Co.*, now reported bring the decisions on this subject down to date and contain the views of various Courts upon the fencing sections of the Railway Act, 1903. The law under earlier statutes has been fully dealt with in *James v. Grand Trunk R.W. Co.*, 1 Can. Ry. Cas. 407 and 409; *Grand Trunk R.W. Co. v. James*, *ib.* 422 and notes hereto at p. 436; *Huot v. Quebec R.W. Co.*, 2 Can. Ry. Cas. 367; *Davidson v. Grand Trunk R.W. Co.*, *ib.* 371; *Fensom v. Canadian Pacific R.W. Co.*, *ib.* 376, 3 Can. Ry. Cas. 231; 4 Can. Ry. Cas. 76, and notes; *McKellar v. Canadian Pacific R.W. Co.*, 3 Can. Ry. Cas. 322; *Plath v. Grand Forks, etc., R.W. Co.*, *ib.* 331, all of which were decided under the Dominion Railway Act, 1888, and in *Dreger v. Canadian Northern R.W. Co.*, 5 Can. Ry. Cas. 332; *Phair v. Canadian Northern R.W. Co.*, *ib.* 334; *Arthur v. Central Ontario R.W. Co.* *ib.* 318; *Bacon v. Grand Trunk R.W. Co.* *ib.* 325, and *Lebu v. Grand Trunk R.W. Co.* *ib.* 329, all of which, as well as the cases now reported other than *Quebec Central R.W. Co. v. Pellerin*, *ante*, p. 1 were decided under sections 199 and 237 of the Railway Act, 1903. The differences between the Acts of 1888 and 1903, have been pointed out in *Canadian Railway Act (Annotated)* pp. 308 to 319 and 451 to 456. Reference may also be made to *Eggleson v. Canadian Pacific R.W. Co.* and *Duggan v. Canadian Pacific R.W. Co.* 1 West. L.R. 356; *Canadian Pacific R.W. Co. v. Eggleson*, 36 S.C.R. 641, and *Rhysdale v. Wabash R.W. Co.*, 7 O.W.R. 677, all of which are also decided under the Act of 1903.

The sections of the Act of 1903 considered in the above cases have been considerably changed in the late revision of the sta-

tutes, which will be ch. 37 of the Revised Statutes of Canada, 1906. For former section 199, the following is substituted:—

Section 254. "The company shall erect and maintain upon the railway,—

(a) fences of a minimum height of four feet six inches on each side of the railway;

(b) swing gates in such fences at farm crossings of the minimum height aforesaid, with proper hinges and fastenings: Provided that sliding or hurdle gates constructed before the first day of February, one thousand nine hundred and four, may be maintained; and,

(c) cattle-guards, on each side of the highway, at every highway crossing at rail level with the railway.

2. The railway fences at every such highway crossing shall be turned into the respective cattle-guards on each side of the highway.

3. Such fences, gates and cattle-guards shall be suitable and sufficient to prevent cattle and other animals from getting on the railway.

4. Whenever the railway passes through any locality in which the lands on either side of the railway are not inclosed and either settled or improved, the company shall not be required to erect and maintain such fences, gates and cattle-guards unless the Board otherwise orders or directs. 3 Edw. VII., ch. 58, sec. 199.

While there are several minor changes in this section that are not perhaps of much importance, nevertheless the two previous sections require to be compared and the present one scanned for verbal changes. Sub-section (b) of the previous section instead of having the words "at farm crossings" after "fences" in the first line formerly had them after the word "fastenings" in the second line:

Sub-section 4, lines 2 and 3 of the previous Act read in part, "the lands on either side of the railway are not improved or settled and inclosed." They now read, "are not inclosed and either settled or improved." This change is intended to clear up the doubts which arose in such cases as *Schellenberg v. Canadian Pacific R.W. Co.* and *Lizotte v. Temiscouta R.W. Co.*, reported *ante*. The change in the section confirms on this point the opinions of the learned Judges who heard these cases.

Section 294 of the new Act is now substituted for section 237 of the Act of 1903, and reads as follows,—

"No horses, sheep, swine or other cattle shall be permitted to be at large upon any highway, within half a mile of the intersection of such highway with any railway at rail level, unless they are in charge of some competent person or persons, to prevent their loitering or stopping on such highway at such intersection, or straying upon the railway.

2. All horses, sheep, swine or other cattle found at large contrary to the provisions of this section may, by any person who finds them at large, be impounded in the pound nearest to the place where they are so found, and the pound-keeper with whom the same are impounded shall detain them in like manner, and subject to like regulations as to the care and disposal thereof, as in the case of cattle impounded for trespass on private property.

3. If the horses, sheep, swine or other cattle of any person, which are at large contrary to the provisions of this section, are killed or injured by any train, at such point of intersection, he shall not have any right of action against any company in respect of the same being so killed or injured.

4. When any horse, sheep, swine or other cattle at large, whether upon the highway or not, get upon the property of the company and are killed or injured by a train, the owner of any such animal so killed or injured shall, except in cases otherwise provided for by the next following section, be entitled to recover the amount of such loss or injury against the company in any action in any Court of competent jurisdiction unless the company establishes that such animal got at large through the negligence or wilful act or omission of the owner or his agent, or of the custodian of such animal or his agent.

5. The fact that any such animal was not in charge of some competent person or persons shall not, if the animal was killed or injured upon the property of the company, and not at the point of intersection with the highway, deprive the owner of his right to recover. 3 Edw. VII., ch. 58, sec. 237."

There are a number of verbal changes in all sub-sections of this section, but an important change is introduced into sub-section 4, lines 1 and 2, which formerly read, "When any cattle or other animals at large upon the highway *or otherwise* get upon the property of the company." The words "*or otherwise*" are now dropped and instead appear the words "*whether upon the highway or not.*" This change is important because

it now makes it clear that in any case where cattle at large get upon the railway track whether from a highway or elsewhere owing to any defect in the company's cattle-guards or fences, the company will be liable unless negligence on the part of the owner is shewn, thus altering the effect of such decisions as *Carruthers v. Canadian Pacific R.W. Co.*, and *Daigle v. Temiscouta R.W. Co.*, now reported.

Sub-section 5 of the new section formed the concluding words of sub-section 4 of the previous enactment, and in sub-section 4 a number of other verbal changes occur.

The decision of *Flewelling v. Grand Trunk R.W. Co.*, ante, p. 47 turns upon a point decided some years ago in *Kilmer v. Great Western R.W. Co.*, 35 U.C.R. 595, and *Clayton v. Great Western R.W. Co.*, 23 U.C.C.P. 137, which hold that a railway company is not responsible where cattle escape owing to a fence being taken down or erected in a particular manner at the land owner's request.

The damages allowed in *Lizotte v. Temiscouta R.W. Co.*, for injury to crops owing to the cattle escaping raises the question discussed in Canadian Railway Act (Annotated) pp. 315 and 316, namely, whether damages can be recovered for defective fencing where such injuries are not done by the company's trains or engines. Under the Railway Act, 1888, there would be but little question that no damages could have been recovered for injury to crops owing to the cattle escaping, see *Young v. Erie and Huron R.W. Co.*, 27 O.R. 530, and *McKellar v. Canadian Pacific R.W. Co.*, 3 Can. Ry. Cas. 322. No penalty is now imposed in terms for a breach of section 199 of the Act of 1903, now the equivalent of section 254 of the Act of 1906, and having regard to the law in other cases, namely, that each person must keep his cattle from trespassing, one would think that no damages other than those caused by the company's trains could be recovered. A reference to section 237 of the Act of 1903, now section 294 of the Act of 1906, makes it clear that the only damages recoverable for a breach of that section are those caused by a train and as pointed out in the Railway Act (Annotated) at pages 315, 316 and 456, this section may even yet be construed as extending to all cases where cattle escape upon the railway track through defective fences or cattle-guards. The case of *Flewelling v. Grand Trunk R.W. Co.*, ante, p. 47 though not decided upon this point, also raises it because there the horse was killed by falling from a bridge.

NEGLIGENCE—DEFECTIVE ROAD-BED—ONUS.

CANADA.]

[SUPREME COURT.

THE QUEBEC AND LAKE ST. JOHN R.W. CO. v. MARIE JULIEN,
ÈS NOM ET ÈS QUALITÉ.

(37 S.C.R. 632).

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE
PROVINCE OF QUEBEC.

*Railways—Negligence—Defective construction of road-bed—Dangerous way—
Vis major—Evidence—Onus of proof—Latent defect.*

The road-bed of applicants' railway was constructed, in 1893, at a place where it followed a curve round the side of a hill, a cutting being made into the slope and an embankment formed to carry the rails, the grade being one and one-half per cent. or 78.2 feet to the mile. The whole of the embankment was built on the natural surface, which consisted as afterwards discovered, of a lair of sandy loam of three or four feet in depth resting upon clay subsoil. No borings or other examinations were made in order to ascertain the nature of the subsoil and the road-bed remained for a number of years without shewing any subsidence except such as was considered to be due to natural causes and required only occasional repairs; the necessity for such repairs had become more frequent, however, for a couple of months immediately prior to the accident which occasioned the injury complained of. Water, coming either from the berm-ditch, or from a natural spring formed beneath the sandy loam, had gradually run down the slope, lubricated the surface of the clay and, finally, caused the entire embankment and sandy lair to slide away about the time a train was approaching, on the evening of 20th September, 1904. The train was derailed and wrecked and the engine-driver was killed. In an action by his widow for the recovery of damages, *Held*, that in constructing the road-bed, without sufficient examination, upon treacherous soil and failing to maintain it in a safe and proper condition, the railway company was, *prima facie*, guilty of negligence which cast upon them the onus of shewing that the accident was due to some undiscoverable cause; that this onus was not discharged by the evidence adduced from which inferences merely could be drawn and which failed to negative the possibility of the accident having been occasioned by other causes which might have been foreseen and guarded against, and that, consequently, the company was liable in damages.

Judgment appealed from affirmed, following *The Great Western Railway Co. of Canada v. Braid* (1 Moo. P.C. (N.S.) 101).

Present: Girouard, Davies, Idington, MacLennan and Duff, JJ.

APPEAL from the judgment of the Court of King's Bench, appeal side, affirming the judgment of the Superior Court, which had maintained the plaintiff's action with costs.

The action was brought by the widow of the engine-driver of one of the company's freight trains, who was killed in the accident described in the head-note, to recover damages in consequence of his death, caused, as alleged, by the negligence of the railway company in failing to construct and maintain their permanent way, at the place where the accident occurred, in a safe and proper manner. The action was brought in her own name, personally, and as tutrix of her minor children, issue of her marriage with the deceased. At the trial, by Mr. Justice Pelletier without a jury, judgment was entered for the plaintiff for \$4,000, of which \$2,000 was awarded as personal damages to the widow and the balance, \$2,000, as damages found in favour of the children. This judgment was affirmed on appeal by the judgment now appealed from, Bossé and Hall, JJ., dissenting.

The questions at issue upon this appeal are stated in the judgments now reported.

1906, Oct. 16th and 22nd.

Stuart, K.C., for the appellants.

L. A. Taschereau, K.C., for the respondent.

1906, Oct. 29th. GIROUARD, J.:—The appeal is dismissed with costs. I concur in the opinion of my brother Davies.

DAVIES, J.:—This action was brought by the representatives of the locomotive engineer of one of the appellants' trains who was killed in an accident which took place on the appellants' railway line near Chicoutimi, in the Province of Quebec, on the 20th September, 1904.

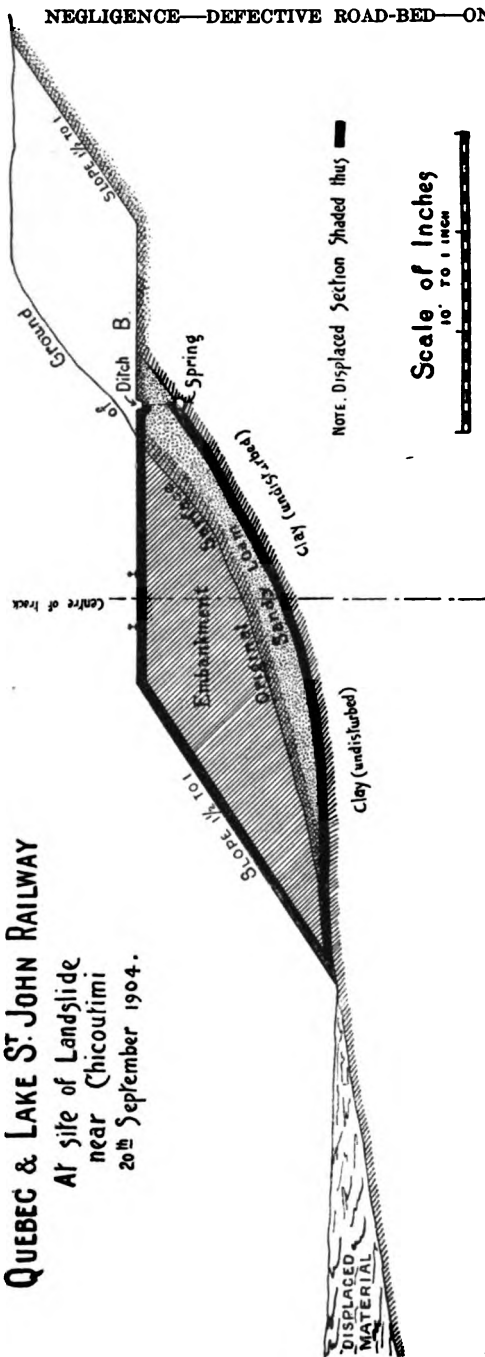
The railway runs along the western slope of the lands descending to the Saguenay River, and at and in the neighbourhood of the place where the accident occurred the country is very hilly.

At the place in question the rails followed a curve on an embankment built on the side of a hill, the hill having been partially cut down or into and the material used to form the embankment. The railway runs practically north and south, and at the place where the accident occurred the grade is represented as being very steep, one and a half per cent. or 78.2 feet to the mile. The road was constructed in 1893, and, according to the evidence of the engineers, was well constructed and generally of a high grade.

Shortly after the accident Mr. Vallée, the inspecting railway engineer for the Province of Quebec; Mr. Hoare, C.E., who was the chief engineer of the railway at the time of its construction in this locality, and Mr. Evans, C.E., who was the contractors' engineer at the time of the construction of the road, visited the scene of the accident at the defendant company's request. As stated in the factum of the defendant (appellant), these gentlemen examined the locality carefully, took measurements and made a plan which was produced as Exhibit D 3. As this plan gives a better idea of the situation than any language I could use can do, I have had it reduced so as to accompany and explain these my reasons for judgment.

CROSS SECTION QUEBEC & LAKE ST. JOHN RAILWAY

At site of Landslide
near Chicoutimi
20th September 1904.



It is common ground between both parties that the entire embankment had been built upon the original surface of the soil on the slope of the hill and that for a depth varying from three to four feet this natural hill surface was composed of sand or sandy loam lying upon a clay bed or bottom, that water had entered into this sandy loam and percolating or running down the slope had lubricated the clay on which the embankment and the layer of sandy loam rested, causing the entire embankment and ledge of sand to slide down into the valley, of course carrying the rails with it.

There was some discussion as to whether the land-slide had taken place before or when the train was actually on the embankment, but that point did not seem to make any difference in the determination of the issues to be decided.

The real question was as to where the water which caused the slide came from, and whether the company should be held liable for its presence underneath the embankment at the locality in question.

The plaintiff contended that the evidence all shewed that this water, which undoubtedly caused the accident, came from the upper or higher lands and percolated either through or alongside of the ditch constructed along the line to carry off the water, down through the three or four feet of sandy loam to the clay beneath, which ditch they contended was not kept clean and clear for months preceding the accident.

The defendant company, on the other hand, contended that this ditch was along a steep slope; that it was always kept clear and open and carried away the surface water, and that the water which caused all the damage came from a hidden spring on the edge of the clay bed underlying the sand ledge and directly underneath the bottom of the ditch at a distance vertically of about three or four feet. The land slide which carried away the embankment with the rails and also the ledge of sand forming the original and natural surface of the soil, left a little triangular corner of this sand ledge intact, of which a vertical line from the ditch to the spring formed one side of the triangle so left.

The first question to be determined in a case of this kind is whether a presumption of negligence or imperfect construction or maintenance arises from the admitted or proved facts. On this point I have no hesitancy in saying that it does, a conclusion reached alike by the majority judgment appealed from as by the minority judges who dissented.

In the *Great Western R.W. Co. of Canada v. Braid*, 1 Moo. P.C. (N.S.) 101, the Judicial Committee, in delivering judgment, say, at p. 116:

“There can be no doubt that where an injury is alleged to have arisen from the improper construction of a railway the fact of its having given way will amount to *prima facie* evidence of its insufficiency, and this evidence may become conclusive from the absence of any proof on the part of the company to rebut it.”

For us, this statement of the law must be held as conclusive, unless called in question by some subsequent decision of that judicial body or of the House of Lords. Other authorities on the subject are collected in a note to 601a of the 9th edition of Story on Bailments.

If this is the law we have then to determine whether the company has met the onus cast upon it. I do not think it has. The engineers called by them do certainly speak of the land-slide having disclosed the existence of what they call a spring lying about three or four feet below the ditch, and express their opinion that the water which caused the trouble came from this spring. But nowhere do they use any language from which any conclusion can be drawn as to the character of this spring or the quantum of water which flows from it. Whether that quantity made a respectable stream or was a tiny trickle only is not stated. The evidence on this point is extremely defective, and, moreover, their opinion is reached apparently by a process of exclusion and on the assumption that the drainage was excellent and carried off all the surface water.

Mr. Vallée, in his evidence, says, at that particular place: “I do not believe that five per cent. of the water could filter into

the sand in a slope of a foot and a half per hundred *if there were good ditches, perfectly cleared, with a slope of a foot and a half per hundred.*"

The other engineer's evidence was based upon similar assumptions, "good ditches, perfectly cleared, with the slope of a foot and a half per hundred."

But where was the evidence of these facts? The man who knew most about them, foreman of the section-men on this section of the railway, and who had been such for years, Harry Fox, left the company almost immediately after the accident, it is said because of insufficient wages, and crossed the international boundary line into the State of Maine. He was not examined either by commission or at the trial, and we are without the benefit of his testimony. It certainly was not suggested in this Court that the company or its officials had anything to do with his removal to the United States, but it is most unfortunate for the company, if he could support their contention on this crucial point, that his evidence was not forthcoming.

The other evidence on this point is given by one Tremblay, Harry Fox's predecessor as foreman of the section-men; two of the section-men, Truchon and Larouch, and Michael Carpenter, the road-master of 150 miles of the railway, including the place in question. The latter witness certainly did state that he passed over the place about a week before, inspecting the road, both in a hand-car and walking, and found the road at the place of the accident in "good condition, ditches in good condition, . . . water running very nicely but very little, . . . (and that) there was nothing to attract or which did attract his attention."

As against this general evidence there was that of the ex-foreman, Tremblay, who swore that, when he was section-foreman, about two years after the completion of the line, he found the water oozing through the slope of the embankment under the railway at the place where the accident happened, and for its protection sunk down some pickets and piled up some railway ties inside them so as to protect the dump, and enlarged it some two or three feet, and then opened up, cleaned and straightened

the ditch leading to the culvert, after which he says that for years, and while he kept the ditch open and clear, there was no further trouble. Truchon, the section-labourer, said that the ditch must be cleared every spring, but that they did not clear it the spring of the accident year, but simply "broke the ice on the surface."

He was a witness called and examined by both sides, and was vigorously attacked by the company's counsel as being stupid, but his credibility seems to have been accepted by the trial Judge who makes no remark upon his alleged stupidity. Accepting the plan put in evidence by the defendant company and prepared and signed by Mr. Evans, C.E., and Mr. Vallée, chief engineer of the Department of Railways of Quebec, after a careful examination of the locality immediately after the accident, for the very purpose of making such plan, as being accurate and correct, it does seem to me that, as the ditch which was to carry off all the water descending from the higher lands upon the railway appears to have been made right over the ledge of sandy loam on which the embankment was constructed, the greatest possible vigilance would be required to keep that ditch in perfect working order. Any imperfection in it or any stoppage of it would probably result in the water it accumulated filtering down through the sandy loam to the clay below. The onus of shewing that such did not take place has not in my opinion been discharged. The placing of such an embankment over such a seam of sand overlying a bed of clay on a hill-side such as this would seem to call for extreme vigilance so as to prevent the surface water from the higher lands percolating through the sand to the clay and so causing a land-slide.

It was suggested by Mr. Stuart that the plan so prepared for and at the request of the company, and put in evidence by them, is inaccurate and misleading in that it does not correctly shew what he suggested was the fact, that the clay bed on which the sand loam strata rested stopped short at the place where the spring is marked, and did not go further up the hill, which he suggested, above that point, was composed of sand. He called

special attention to the evidence of Doucette, the present chief engineer of the road, who stated that the cut in the hill immediately above was about twelve feet deep, and that no clay shewed in that cut. The inference he wished us to draw was that the clay bed stopped some four feet or more below the bottom of the hill-cutting, and that the contractors of the road had no reason to suspect its existence. Assuming that to be the case, he strenuously contended that they were not obliged by boring or otherwise to ascertain the true nature of the foundations on which they built the embankment on this steep hill-side, but were justified in assuming them to be as shewn upon the surface. Without entering further into a discussion of this very interesting legal question, it is sufficient for us to point out that the plan in question was prepared just after the accident, under conditions which enabled the draftsmen to ascertain with absolute accuracy just where the clay bed did lie, and its extent with reference to the cutting above and the embankment; that Mr. Evans stated explicitly that "it correctly represented the condition of things which he found," and that it was put in evidence by the defendant company as correctly representing those conditions, and their expert engineers, in giving their opinions as to whether the company could have foreseen that such an accident was liable to happen as did happen, were asked to do so on the assumption that the plan correctly represented the true condition of things. Not a suggestion was made at the trial as to any inaccuracy in the plans with respect to this clay bed or otherwise, and to ask the Court of Appeal to assume that the plan is misleading in this important particular and to draw the inference that the clay bed did not underlie the sandy loam on the hill-side except at a distance down undiscoverable by the construction of the road unless by borings, is, in my opinion, asking what this Court would not be justified in doing, more especially in the face of ex-foreman Tremblay's evidence as to the soakage of the surface water through the embankment some two years after construction and the means which he then successfully resorted to in order to overcome the difficulty and danger.

The suggestion that the water which caused the damage may have come from the alleged hidden spring loses a great deal of its force from the absence of any evidence as to the size, capacity of or flow from the spring.

It does not satisfy the onus which lay upon the plaintiff, it disproves neither negligence in the original construction or in the proper maintenance of the road-bed under its peculiar and hazardous construction, and it leaves the question of the actual condition of the drains at least open and in grave doubt, and even if accepted as a partial explanation does not negative the fair inference to be drawn from the facts that at least a substantial portion of the water which caused the damage was surface water which filtered through in consequence of defective drainage.

I do not, after a careful consideration of all the evidence given as to the sinking from time to time of the *outer* rail on this embankment, while the inner rail, which naturally bore the greater weight of the passing trains, did not sink at all, draw the conclusion that the company's employees should have suspected the undermining of the embankment. Rather I would conclude that this evidence pointed more to the wearing away of the outer steep sloping surface of the embankment from natural causes and called for its strengthening, which appears to have been attended to. Such evidence does not indicate to me necessarily or reasonably the existence of any defect which caused the land-slide.

Looking at the evidence as a whole I conclude for the foregoing reasons in agreeing with the Court of King's Bench that the presumption of negligent construction and maintenance has not been rebutted, and that the company has failed to discharge the onus which under the circumstances the law casts upon it.

The appeal should be dismissed with costs.

IDDINGTON, J. :—I think this appeal ought to be dismissed with costs.

I cannot subscribe to the entirety of what is relied upon in support of either of the judgments in the courts below, or I would content myself with doing so.

The evidence given by witness Tremblay of what the appellants' foreman, Fox, when off duty, told him, seems to be quoted in each court below as supporting respondent's case. It seems to me that this evidence was not properly admitted, and I discard it entirely in coming to the conclusion I do.

As to the expression used by Fox when engaged on the work, I think it neither adds to nor detracts from the weight of evidence either way, and, therefore, am not concerned to determine whether it was properly admitted or not, though I am inclined to think it was not admissible in the connection, and for the purpose it was presented.

There is much in the case to support the view that there was negligence in the construction of the road in question, at the point now giving rise to many curious considerations. I am unable to see how a railroad can be held to have been constructed without negligence if its road-bed is rested on a hill-side covered by a bed of sand or sandy loam, or both, and requiring artificial embankments along the side of the hill to make that road-bed wide enough to lay a track upon; and yet no attention paid by the contractors or engineers in charge to the thickness of the sand or nature of the sub-stratum upon which this bed of sand, or sandy loam, rested or to ascertain accurately the nature of the foundation whereon they were building.

As one result, this bed of sand, when saturated with water, slid off the bed of clay on which it rested, and which by nature was formed, as one would expect, with an inclination towards the river, and thus well adapted when lubricated by the moisture in the sand, to produce such results as we see here.

It was clearly disclosed as a result of this accident that the bed of sand or sandy loam was only from three to four feet thick, measuring from the surface of the original soil. This bed, resting upon a sloping bed of clay, was, as I understand it, together with the added embankment, the foundation upon which the

track in question rested. It would seem a treacherous sort of foundation to build upon, unless in the course of construction the added embankment was of such extent, weight and material, solidly packed, as to prevent the possibility of the sliding that has taken place.

Time and use would no doubt solidify and improve such a foundation if care were taken to keep water from undermining it or retarding this process of solidification. No care seems to have been taken to discover such springs or other outlets furnishing drainage from the mountain area above, as one is apt to find in the face of all hills. The shallow ditch in the sand would not seem to have been a proper safeguard against what has been discovered, and what I venture to think ought to have been discovered long ago.

A road thus constructed may have appeared to be properly constructed. It was not in fact properly constructed, and with due regard to the necessities for drainage.

It might be, as in truth it was, used for years without disastrous results.

And if it may thus be said to have been in a sense properly constructed, it would nevertheless call for greater care in its maintenance than in the case of a road-bed known to rest upon a level rock or extended level bank of solid clay.

We are left in doubt as to the exact operation of each and all of the manifest causes that brought about this accident. Some may or may not have contributed quite as much as others or as much as we may feel inclined to say when trying to appreciate this evidence and allot to each branch thereof its proper weight.

Some factors producing or tending to produce such an accident as this in question, may be attributable to neglect in construction. Others may be attributable to neglect of maintenance and repair.

It is obvious that either sort of neglect, or the combined effect of both kinds of neglect, must, if found to be the cause or causes of the accident in question, result in finding the appellants liable.

Can there be any doubt, if we accept the evidence of Truchon, that the place where the track gave way had been for at least from six weeks to two months in a dangerous condition? Can any one read his story and doubt that this condition of things was neglected in a way that it should not have been? Can there be any doubt that the sinking of the road-bed and the wet weather were concurrent events? How could any capable man attending to this work have failed to realize that fact? Would a careful, prudent man, fit to be entrusted with such duties as devolved upon this foreman, have been satisfied with what he did, and failed to find, or even to search for, the cause of such repeated subsidences of track as shewn by the evidence if the substance of it is to be believed.

It has been urged that Truchon is stupid. It is not urged that he is dishonest. Reading his evidence does not so impress one as to find in the results of his stupidity an equivalent for dishonesty. The utmost extent to which I can find his stupidity yield unsatisfactory results, is that the exact length of time over which this defective state of the road-bed in question continued, and the exact number of times when it demanded and got attention, beyond that paid to other parts, cannot be fixed. It is not absolutely essential here that they should be so fixed. There is enough to lead to the conclusion that, though the exact dates and numbers of times and length of time cannot be accurately fixed, yet there was for a considerable time (much too long a time) a continuous want of repair on one spot in this road. It was never properly mended there. No attempt was made to find out the cause. Hence all the efforts were quite unavailing.

Fox was the only man of any sort of railway experience, so far as we know, that saw the place, and we do not know what remarkable things passed through his mind. Truchon was certainly not the only stupid one of that party.

Ordinary sense would have taught men fit to be entrusted with such work, that wet weather tends to make things soft, and heavy weights placed thereon sink, yet Fox loaded the outside

of this sinking bank, when obviously sinking from the effects of wet weather, without trying to find where the water in question came from, or went to. The result is before us.

We are asked to sweep aside the facts that are before us, explaining as only facts can, the causes of these results, and substitute, for the facts, the speculation of experts, some of whom never saw the place and the facts, lying open for investigation, and others of whom saw, yet refrained from that thorough investigation that alone can make expert evidence worth anything.

These speculations rest upon the existence of the spring discovered by this accident uncovering the clay bed and shewing the spring about two feet and a half directly underneath (if I understand the plan rightly) the ditch that I have referred to.

It hardly consists with reason to suppose that a spring of any very substantial size or force could have remained for ten or twelve years undiscovered on a sandy hill-side, beneath only so slight a depth as I have mentioned.

Why did it not seek a way out through so very natural a channel for a spring to burst through? And then why not find its way down hill into the ditch? Why did it not do this, as springs usually do under such favourable circumstances, instead of being perverse enough to try and seek a way of its own ten feet (or fifteen, or twenty feet, the plan is uncertain) away, for an outlet?

Driven to explain suggestions like these, the appellants suggest that the spring only came into existence at the time of the accident, or shortly before, and wrought the destruction of life and property in the way that great land-slides are brought about.

If this suggestion had any foundation in the minds of the engineer or engineers who saw it and attribute to it such great consequences, one would have expected them to be able to enlighten us by other appearances than that of a little vein of water, so small that one of them, the only one who speaks of its size, is unable to give us any intelligent idea with regard to that.

We would expect, if this suggestion had been taken seriously, to have found some examination for fissures in the clay, or disturbances in the surrounding earth, that would account for the sudden appearance of such a spring. We would expect such investigation, all the more, because we find such care bestowed upon fissures and disturbances of the earth in other relations that some of these witnesses speak of.

With every respect that one can have on reading such evidence, I cannot help saying that I do not find any evidence for such a theory as the coming into existence suddenly of this spring.

However, none of these experts giving evidence have ventured to meet with their theories the case which Truchon's evidence presents. Any of them confronted with the substance of his evidence failed to say that their theory would hold good as shewing the cause of the accident, in face of such assumed facts.

It seems clear that this spring, called by road-master Carpenter "a very small stream, a vein," was most insignificant, and probably nothing but what, in very wet weather, may be found at any time on the hill-sides. In dry weather probably it had no existence.

The state of repair of the ditch seems much in doubt. The evidence is conflicting. It is contradictory. It is clear, moreover, that the foreman thought proper to dump stones and other refuse into this ditch. I must be permitted to doubt how long they stayed there. Something of that kind, happening then, or at some other time, probably accounts for the change in the course of the weepings of this spring.

Insignificant as I think it was, possibly it had something to do with the supply of the water which softened the bank. It was not, however, the only supply.

When this case is stripped of all these mysterious suggestions and theories, as I think it must be stripped of them to comprehend it properly, we have the broad fact presented to us that for want of proper drainage this embankment was un-

dermined and the surface of the clay lubricated; hence the accident. We have this outstanding feature of the case, which may be called negligent construction, or negligent maintenance and repair, as one may be disposed to look at the facts.

We have, moreover, along with that no mystery, no unforeseen cause, no *vis major*; for we have had the results of this development holding up a signal as it were for at least six weeks before this occurrence, without attracting the eyes of those whose duty it was to see and observe such signals. I prefer to call this a neglect of repair and maintenance.

MACLENNAN, J., concurred in the reasons stated by Davies, J.

DUFF, J.—I agree to the dismissal of the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Pentland, Stuart & Brodie.*

Solicitors for the respondent: *Fitzpatrick, Taschereau, Roy, Cannon & Parent.*

NEGLIGENCE—JURY—LOOK AND LISTEN.

CANADA.]

[SUPREME COURT.

THE WABASH R. W. CO. V. ISABELLA MISENER AND OTHERS.

(38 S.C.R. 94.)

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Negligence—Railway company—Findings of jury—"Look and listen."

M. attempted to drive over a railway track which crossed the highway at an acute angle where his back was almost turned to a train coming from one direction. On approaching the track he looked both ways, but did not look again just before crossing when he could have seen an engine approaching which struck his team and he was killed. In an action by his widow and children the jury found that the statutory warnings had not been given and a verdict was given for the plaintiffs and affirmed by the Court of Appeal.

Held, affirming the judgment of the Court of Appeal (12 Ont. L.R. 71), Fitzpatrick, C.J., *hesitante*, that the findings of the jury were not such as could not have been reached by reasonable men and the verdict was justified.

*Present: Fitzpatrick, C.J., and Davies, Idington, MacLennan and Duff, JJ.

APPEAL from a decision of the Court of Appeal for Ontario, 12 Ont. L.R. 71, affirming the judgment at the trial in favour of the plaintiffs.

In the judgment of the Court of Appeal delivered by Mr. Justice Garrow the facts are stated as follows:

"The facts are simple and not seriously in dispute. On 13th August, 1904, about 2 p.m., Robert Misener, aged 48 years, a farmer, was driving with a team of horses and a waggon along a highway in the County of Welland, which is crossed by defendants' line of railway, and at the intersection he was struck by an engine in charge of defendants' servants and instantly killed, his horses killed and his waggon and harness destroyed.

"The engine was unattached and was running through from Niagara Falls to St. Thomas at a high rate of speed; one witness, Mrs. Louisa Pew, who had resided near the crossing for 13 years, stating that she had never seen an engine going so fast since she lived there, and even the trainmen admitted that they were going at from 35 to 40 miles an hour.

“Deceased, as he approached the track, was driving at a pace of about three miles an hour. Immediately behind him, going in the same direction was one William Locke, also driving, who was called as a witness by plaintiffs. Asked to tell what took place, Mr. Locke said; ‘Well, the engine gave toot-toot and then the crash came about the one time.’ The engine ran, after the collision, from a quarter to a half a mile. When it struck the waggon, it made it ‘go up in splinters,’ and deceased was thrown up the track ‘out of our sight.’ Locke did not stop because the sight had made his wife, who was with him, ill. He saw deceased as he approached the crossing look towards the ‘Falls’ (the direction from which the engine came) and then look the other way. He (the witness) also looked at the same time and saw and heard nothing on the track. At the time deceased looked, his horses ‘were going on to the rails, I could not say how far.’ On cross-examination he became a little more definite as to the exact place at which deceased looked, which was, he said, at the raise of the road to go up to the track, which would be at least as far back as the railway fence. Until the line of the railway fence is reached, there are obstructions to a clear view, such as the fences themselves, an orchard which approaches but does not reach the corner, and a walnut tree, which was then in leaf, as was also the orchard. But when the fences are reached and passed, and before the rails are actually reached, there is an unobstructed view for a considerable distance, perhaps a quarter of a mile, along the track in the direction from which the engine came, and if deceased had looked again when at or past the fence and before he reached the rails, this witness deposed that he could have seen the approaching engine, and could, as his horses were going at a slow pace, have turned towards the side, and thus have avoided the collision.

“There was no evidence that deceased looked more than once, and the substantial point in the case is whether, under the circumstances, his failure to look again is fatal, the defendants contending at the trial and before us that such failure to look again was conclusive proof of contributory negligence, and that

the case should have been withdrawn from the jury. The judge refused a motion for nonsuit, holding that there was evidence proper to be submitted to the jury.

"The jury in answer to questions found that the whistle was not sounded nor the bell rung, and that such neglect was the proximate cause of the injury, and that deceased could not by the exercise of ordinary care have avoided the injury. Other questions based upon the possibility of an affirmative answer to the question as to contributory negligence were also put and answered, but they apparently became of no consequence when contributory negligence was negatived. And the jury assessed the damages as follows: To the widow, Isabella Misener, \$800; daughter, Ethel, \$300; daughter, Flossie, \$500; son Norman Robert, \$800; and the damages to personal property, \$440."

1906, Nov. 28th and 29th. *Rose*, for the appellants. The evidence was not sufficient for submission of the case to the jury and the Judge should have withdrawn it. *Giblin v. McMullen*, L.R. 2 P.C. 317; *Wakelin v. London & South Western R.W. Co.*, 12 App. Cas. 41.

The late case of *Andreas v. Canadian Pacific R.W. Co.*, 37 Can. S.C.R. 1, is in point.

German, K.C., for the respondents referred to *Peart v. Grand Trunk R.W. Co.*, 10 Ont. L.R. 753.

1906, Dec. 11th. THE CHIEF JUSTICE:—This is certainly "as weak a case as can well be conceived" and almost involves the proposition that "given an accident at a railway crossing of a nature consistent with the absence of negligence, the company is presumed to be guilty of negligence in respect of it." I concur in the judgment, but with much hesitation. No specific defect in the roadbed or in the construction or equipment of the locomotive is complained of. The accident is alleged to have been occasioned through the negligence of the defendants' em-

ployees with respect to the ringing of the bell and blowing of the whistle. To ring the bell and blow the whistle at a highway crossing is a statutory duty, the neglect of which renders the engineer and fireman of a locomotive liable to a criminal prosecution. The legal presumption is, therefore, that they performed their duty and, in the absence of evidence to the contrary, the plaintiff's action must be dismissed. The most that can be said in this case is that it is proved negatively, on behalf of the plaintiffs, that certain witnesses did not hear the bell or the whistle, and, affirmatively, it is proved by those best in a position to know, the engineer and the fireman, that the requirements of the statute in that respect were strictly complied with. In view of the cases, however, I assume that this is a question which must be submitted to the jury and by their answer we are bound.

But the onus is on the plaintiffs to shew, assuming that the negligence of the defendants is proved, that such negligence was the determining cause of the accident, and, on the evidence, I should have been strongly inclined to the view that the state of things existing at the time of the accident was consistent with the theory that the death was caused by the deceased's own negligence, and, at the most, that the event occurred through the joint negligence of the deceased and of the servants of the defendant company.

The question for the jury was: Could the deceased by a reasonable use of his senses have discovered the proximity of the approaching train in time to avoid the accident?

Approaching the line at one hundred feet from the crossing there is a clear view of the track for a distance of one thousand three hundred and fifty feet, and, at the railway fence, which is about seventy-two feet from the crossing, there is a clear line of sight to a point 1,700 feet away.

The plaintiffs' own witness, Locke, the only one examined of the two persons who were eye-witnesses of the accident, proves that at any point between the railway fence and the southern rail there was a clear view in the direction from which the train was coming of 1,700 feet, and this same witness gives evidence

to the effect that the deceased could, had he looked when there, have seen as far as the second whistling post, a quarter of a mile distant. He also admits, on cross-examination, that the horses of the deceased, which were then moving at a slow walk, could have been turned aside and the accident avoided. Approaching this crossing the deceased was bound "to use such faculties of sight and hearing as he was possessed of." If he did not do so he was negligent. If, having done so, he saw the train, as he must have done according to the evidence of the sole witness of the accident, and he went recklessly forward, then he voluntarily incurred the risk and must suffer the consequences. *Cooper v. The North Carolina R.W. Co.*, 3 L.R.A. (N.S.) 391; 52 S.E. Rep. 932; *Schmidt v. Missouri Pacific R.W. Co.*, 3 L.R.A. (N.S.) 196; 191 Mo. 215; *Grand Trunk R.W. Co. v. McKay*, 34 Can. S.C.R. 81.

I assume, however, that to reach a conclusion as to which of the two parties is responsible for the accident, admitting that both were negligent, a comparison of the facts by the jury was necessary and, by their finding, the cases seem to hold that the Court was bound.

For all these reasons I entertain grave doubt and, were it not for the conclusion reached by the careful and learned trial Judge adopted by the Court of Appeal, I would have held that the Judge, on a preliminary question of law, should have decided that there was no evidence on which the jury could properly find for the plaintiffs, but I defer to my brother Judges and adopt their view.

DAVIES, J.:—I do not desire, even by implication, to cast a doubt upon the reasonable and salutary rule so frequently laid down by this Court as to the duty which the law imposes upon persons travelling along a highway while passing or attempting to pass over a level railway crossing. They must act as reasonable and sentient beings and, unless excused by special circumstances, must look before attempting to cross to see whether they

can do so with safety. If they choose, blindly, recklessly or foolishly to run into danger, they must surely take the consequences.

In the case at bar the jury found that the statutory requirements as to the engine sounding the whistle and ringing the bell before coming to the crossing had not been complied with, and further, that the deceased who was killed at the crossing had not been guilty of contributory negligence.

The appeal was not sought to be allowed because of anything wrong or misleading in the Judge's charge except with respect to his direction as to looking and listening. That charge was very clear and, in my opinion, covered all the disputed points in a manner leaving nothing to be desired.

That learned Judge did not indicate any disapproval of the findings of the jury. On the contrary he directed judgment to be entered upon them for the plaintiffs for the amount of the damages, having previously refused to nonsuit.

An appeal to the Court of Appeal for Ontario was dismissed and we are now asked to reverse the judgment of two Courts founded on findings of facts by a jury on matters peculiarly within their province.

The only question open to us to consider is whether the findings are such as, under the circumstances of the case, reasonable men might fairly find.

In deference to the strong argument pressed by Mr. Rose upon us, I have gone over the evidence with great care and the conclusion I reached was not one that the findings were such as, in the face of the conflicting evidence, reasonable men could not fairly have found.

There were two or three points in the case to which the appellants did not seem to me to attach sufficient importance. One was that the railway crossed at an acute angle and not at right angles and that a traveller going northwesterly, when crossing the railway tracks, would have his back turned almost to the approaching train. Another was the unwonted speed with which the unattached engine which killed the deceased approached the

highway and another that he could not have seen the approaching train until he was past the railway fence at the crossing.

Now, assuming the findings of the jury as to the signals to be correct, the only question remaining would be as to the manner in which deceased discharged his duty of looking along the track behind him. At best the moments when he could have seen the engine at all might be counted by seconds and I think the evidence as to the degree of care exercised by him, in view of these facts, quite sufficient to justify the finding of the absence of contributory negligence. *Barry Railway Co. v. White*, 17 Times L. R. 644; and see Lord Cairns' judgment in the *Slattery Case*, 3 App. Cas. 1155, at page 1166.

IDINGTON and DUFF, JJ., concurred in the opinion of Mr. Justice Davies.

MACLENNAN, J.:—I am of opinion that this appeal should be dismissed.

Appeal dismissed with costs.

Solicitor for the appellants: *W. R. Riddell*.

Solicitors for the respondents: *German & Pettit*.

RAILWAY CROSSINGS—INTERLOCKING APPLIANCES.

CANADA.]

[BOARD OF RAILWAY COMMISSIONERS.

IN RE CANADIAN PACIFIC RY. CO. AND GRAND TRUNK RY. CO.

LENNOXVILLE CROSSING CASE.

Railway crossings—Interlocking appliances—Order of the Board.

Under an agreement dated May 22nd, 1887, it was agreed between the Grand Trunk Railway Company and the International Railway Company (whose successor is the Canadian Pacific Railway Company) that the said International Railway Company should bear the cost of providing, maintaining, equipping and working an ordinary level railway crossing together with all risk arising from such constructions and operations. The agreement also contained the following provision: "In the event of the Government of this Dominion passing any Act whereby certain signals, interlocking switches or other appliances shall be used on level railway crossings, it is hereby understood and agreed that the party of the second part" (being the International Company) "will provide, work and maintain such at their own expenses:"

Held, that the said clause of the agreement should not be narrowly construed, that the Board had authority under the Railway Act, 1903, to order an interlocking system at this crossing for the protection of the public.

Ordered, that the Canadian Pacific Railway Company do install, maintain and operate the ordinary interlocking, derailing and signal system at its own expense at the said crossing.

UNDER an agreement dated May 22nd, 1887, it was agreed between the Grand Trunk Railway Company and the International Railway Company (whose successor is the Canadian Pacific Railway Company) that the said International Railway Company should bear the cost of providing, maintaining, equipping and working an ordinary level railway crossing together with all risk arising from such construction and operation.

The agreement also contained the following provision: "In the event of the Government of this Dominion passing any Act whereby certain signals, interlocking switches or other appliances, shall be used on level railway crossings, it is hereby understood and agreed that the party of the second part" (being

the International Company) "will provide, work and maintain such at their own expense."

This application was heard by the Board at Montreal on 30th Oct., 1906.

M. K. Cowan, K.C. for Grand Trunk Ry. Co.

A. R. Creelman, K.C. for the Canadian Pacific Ry. Co.

Nov. 17, 1906. **THE CHIEF COMMISSIONER**:—After an examination of the crossing of the line of the Grand Trunk Railway Company at Lennoxville, Que., by the line of the Canadian Pacific Railway Company, the Chief Engineer of the Board reported that a complete interlocking plant ought to be put in for the protection of the crossing, and that the Canadian Pacific Railway Company, as being the junior company at that point, should bear the cost thereof. The Canadian Pacific Railway Company made objection to being ordered to bear the whole of this expense, claiming that the protection had been rendered necessary by increase of traffic upon the line of the Grand Trunk Railway, and principally by the traffic arising from the running of trains of the Boston and Maine Railroad Company along those tracks under agreement with the Grand Trunk Railway Company.

The Grand Trunk Railway set up an agreement made between it and the International Railway Company, under which the latter company constructed the crossing in question, and claimed that the line of the Canadian Pacific Railway at that point was derived from the International Railway Company, and that the Canadian Pacific Railway Company was subject, in respect to the crossing, to the terms of the agreement with the International Railway Company; and the Grand Trunk Railway Company contended that, by the terms of the last mentioned agreement, the Canadian Pacific Railway Company, as the successor of the International Railway Company, was bound to pay the cost of any interlocking system which the Board might order to be installed at that point.

The question thus raised has been argued before us by counsel.

The agreement for the crossing bears date the 22nd May, 1887. It recited that the International Company required to cross with its railway and intersect the railway of the Grand Trunk Railway Company on a level crossing at a designated point, and that the Grand Trunk Company was willing to allow the crossing at the place mentioned upon and subject to the terms and conditions in the agreement set forth. The agreement provided that the cost of the crossing was to be paid and borne by the International Company; that the crossing was to be maintained in thorough good working order to the satisfaction of the Chief Engineer of the Grand Trunk Railway Company; and that, in case of neglect in this respect, the Grand Trunk Company should have the right to do the works deemed by it necessary for the proper maintenance of the crossing at the expense of the International Company; that the International Company should erect certain specified signals at designated points and maintain the same in good and thorough condition and working order, and furnish all necessary fuel, oil, etc., and every other requisite for the efficient service of the same; that the wages of the signal man should be paid by the International Company, which was to be liable for all his acts and omissions; that certain cattle guards, water ways and ditches were to be placed at the crossing and maintained by the International Company; and that the International Company should pay to the Grand Trunk Company, for the right of crossing, one hundred dollars per annum; and the agreement further provided as follows: "In the event of the Government of this Dominion passing an Act whereby certain signals, interlocking switches, or other appliances, shall be used on level railway crossings, it is hereby understood and agreed that the party of the second part" (being the International Company) "will provide work and maintain such at their own cost."

At the date of this agreement, the General Railway Act in force was that set out in the Revised Statutes of Canada, ch.

109. That Act (sec. 6, sub-sec. 4) authorized the construction, maintenance and operation of a railway across another railway; and (sub-sec. 13) the crossing of one railway by another. By the last sub-section referred to, in case of disagreement as to the amount of compensation, or upon the point or manner of crossing, the same was to be determined by arbitrators; but (sub-sec. 14) it was provided that no railway company should avail itself of the power of crossing without application to the Railway Committee of the Privy Council for approval of the mode of crossing, union or intersection proposed. By section 50 of that Act, "Every locomotive or railway engine, or train of cars, on any railway, shall, before it crosses the track of any other railway on a level, be stopped for the space of at least one minute."

In 1887, Parliament passed an Act amending the Railway Act as set out in the Revised Statutes, which was assented to on the 23rd of June, or about one month after the making of the agreement between the two railway companies.

By the amending Act it was provided that, notwithstanding anything contained in sec. 50 of the Act in the Revised Statutes, whenever there should be adopted and in use on any railway at any crossing thereof at rail level by any other railway, an interlocking switch and signal system or other device, which, in the opinion of the Railway Committee of the Privy Council, rendered it safe to permit engines and trains to pass over such crossing without being brought to a stop as by the former Act provided, the Railway Committee might, by written order, give permission for engines and trains to pass without stopping, under such regulations as to speed as the Committee deemed proper; and the Railway Committee was empowered to direct companies, whose lines crossed each other, to adopt, and put in use at the crossing, such interlocking switch and signal system or other device as, in the opinion of the Committee, rendered it safe to permit engines and trains to pass over the crossing without being brought to a stop. These provisions were carried into the Railway Act of 1888.

In the Act of 1903, the power thus given to the Railway Committee was transferred to this Board.

I do not think that the clause in the agreement between the railway companies relating to interlocking plant and appliances should be narrowly construed. One must endeavour by a perusal, not only of the clause itself, but also of the whole agreement, to get at the intention of the parties. Strictly, it was incorrect to speak of the "Government of this Dominion" as passing an Act; but the word "Government" should be construed as referring to the supreme authority having power to enact laws. The parties responsible for the language of the agreement should be presumed to be parties having some technical knowledge of the subject with which they were dealing. They were hardly expecting that any general law would be enacted requiring the placing of an interlocking system at every level railway crossing in Canada. It would be known to them that many crossings would exist of such a nature that it would not be advisable to install such a system thereat, and where Parliament was not likely to require it to be done. The clause, therefore, can hardly be construed as referring to the passing of a general Act requiring the protection of all level crossings in this way. It should be deemed applicable to cases in which there should be an Act requiring the adoption of such a system for a crossing of the kind of that with which the agreement was dealing. It would be a very narrow construction of the clause to say that it applied only when there was technically an Act of Parliament which, by its own terms, required this adoption in such a case. I think that the clause should be construed as covering a case in which Parliament, through a subordinate body, such as the Railway Committee or this Board, to which should be delegated the powers of Parliament for the purpose, should make an order having the force of law requiring the use of such a system at crossings of the kind of that referred to, or even at that particular crossing alone. Probably the very Act assented to on the 23rd of June was in the minds of the draftsmen of

the agreement. At any rate it appears to me reasonable that the clause should be construed as applying to the particular event which will happen if and when this Board makes an order requiring the adoption of a system of the kind mentioned at this particular crossing. This view is supported by reference to the whole agreement. A considerable annual payment was to be made for the right of crossing, and very great care is taken throughout the agreement to impose upon the International Company all the expense and all the risk arising from the making of this crossing. The principle of requiring compensation in money or otherwise, in such a case, has been allowed to fall into disuse, probably because it turned out of little practical value, since companies getting compensation one day would be compelled to pay such the next day, and the balance of advantage would be likely to be so small and so uncertain, that it was not thought desirable to consider it. The mere keeping of accounts under such a system was probably found onerous and expensive. But it is usual to compel the junior company to bear all the cost arising out of such a crossing and its protection; and in a case in which compensation was expressly required, and the new company expressly required to bear all the risk, the presumption is that the clause relating to the introduction of further protective appliances was intended to be construed strictly against the new company.

I am, therefore, of opinion that the Canadian Pacific Railway Company should be directed to install, maintain, and operate at the crossing in question, the ordinary interlocking, derailing, and signal system at its own expense.

Ordered, that the Canadian Pacific Railway Company do install, maintain and operate the ordinary interlocking, derailing and signal system at its own expense at the said crossing.

AGREEMENT—CONTROLLABLE FREIGHT.

ONTARIO.]

[BOYD, C.
[COURT OF APPEAL.
[PRIVY COUNCIL.

MICHIGAN CENTRAL R.W. CO. v. LAKE ERIE & DETROIT
RIVER R.W. CO.

(Unreported.)

Interpretation of Agreement—Controllable Freight.

By an agreement providing that the defendants should ship by the lines of the plaintiffs their controllable freight for points reached by the lines of the plaintiffs and their connections to the amount of \$35,000 per annum, if the controllable freight amounted to that, if not, then all of it.

The defendants contended that the plaintiffs should supply them with cars for the carriage of the freight according to the custom or practice alleged to be usual in the case of a local line bringing freight to a trunk line consigned to a point on the trunk line or reached by its connections:—

Held, restoring the judgment of Boyd, C., at the trial and reversing the Court of Appeal, MacLennan, J.A., dissenting.

1. That "controllable freight" means business, that is goods, which the shipper has not himself directed to be carried by a particular line or route to its destination.
2. That the alleged practice to supply cars was not to be imported into the special contract between the plaintiffs and defendants.
3. That the contract was plain, certain and unambiguous both on its face and when applied to the subject of it for fulfilment and execution, and its meaning was not rendered uncertain by anything extrinsic; and the evidence that the plaintiffs' officers for a time acted upon the defendants' understanding of the contract would not affect the legal construction of it.
4. That the plaintiffs were entitled to a reference to ascertain the amount received for any "controllable freight" shipped by the defendants contrary to the terms of the agreement.

APPEAL from a decision of the Court of Appeal for Ontario reversing the judgment at the trial in favour of the plaintiffs. The facts of the case will be found to be fully stated in the dissenting judgment of Mr. Justice MacLennan in the Court of Appeal for Ontario.

The judgment of the trial Judge and of the Judges of the Court of Appeal follow:—

May 28, 1904. THE CHANCELLOR:—I have gone through the papers and agreement in this case.

Upon the proper meaning of the agreement I think the plaintiffs are right and that its terms cannot be modified by a reference to previous practice under different circumstances. A new relation was established by the terms of the written and sealed contract, and under it the obligation undertaken by the defendants was to ship all controllable freight via the plaintiffs for points reached by the plaintiffs' lines and connections. Had the intention been to give the plaintiffs only a preferential option over other competing trunk lines to obtain its foreign freight upon sending cars to receive it, different language would have been employed to manifest this intent. The evidence from the letters would appear to shew a waiver or condonement of earlier breaches occurring before the parties had defined their attitude clearly in respect to their understanding of the agreement. The operating officers on both sides appear to have considered that both the contracting parties, both plaintiffs and defendants, were to contribute cars, and were working out on that footing. I think such departures as were occasioned by that manner of operation between them should not be investigated with a view to damages. It would be unfair I think to charge losses during that time to the defendant company, because they were induced to act in that way by the action in the same direction of the plaintiffs. It should be referred to the Master to ascertain and report what amount has not been received by the plaintiffs in respect of tolls upon any freight shipped by the defendants contrary to or in breach of the agreement in the pleadings mentioned dated 1st November, 1900. The enquiry will be directed as to controllable freight, by which I understand freight that was to be shipped by such route as the defendants might be free to select as between the shipper and the company. The account I think should not begin before August, 1901.

April 12, 1905. Moss, C.J.O.:—I have had an opportunity of reading the judgment of my brother Osler and I agree in the conclusion at which he has arrived.

OSLER, J.A.—I am of opinion that the contention of the appellants is entitled to prevail. The question is what is the meaning of the words “controllable freight” in the 7th clause of the agreement.

These words are not defined or explained by the agreement itself and their meaning must be ascertained by reference to the surrounding circumstances as they existed at the date of the agreement. What was controllable freight then, was the controllable freight which the agreement was dealing with. There is no evidence that the parties were contracting about anything else, or that they intended to enlarge its meaning or to make any change beyond insuring that such controllable freight should all be sent over the plaintiffs’ line.

Some things are clear and the contrary is not contended for by the plaintiffs:

(a) The freight referred to is not local freight, but through freight which is intended to be carried over the plaintiffs’ lines and its connections.

(b) It was not intended that such freight should be carried over these lines in the defendants’ cars. The defendants were not bound to send their cars or allow them to be taken off their own lines.

I think it is also established by the evidence.

(c) That shippers of through freight will not submit to transshipment at junction points into the plaintiffs’ cars at these points. The transshipment would have to be done by the plaintiffs. There is no evidence that this would be done at their expense and apart from the inconvenience and risk of loss, and the delay inevitably entailed by transshipment, shippers would naturally not select a route where the additional expense caused by it would be thrown upon them.

(d) Up to the time of the agreement the general practice had been, and no doubt for these very potent reasons, for the plaintiffs and other trunk lines to supply their cars to receive the through freight, the defendants hauling them to the point on their own line where it was to be delivered to them. If the

plaintiffs did not supply them there was under the circumstances really no option to the shipper as between the plaintiffs and other competing trunk lines.

From these facts and circumstances it appears to me quite a legitimate inference that the controllable freight contemplated by the agreement was what one of the witnesses designated as "unrouted freight," the designation of the line by which it was to go being left by the shipper to the option of or under the control of the defendants to be forwarded having regard to the interests of the shipper, in accordance with the usual course of dealing which then prevailed; viz., by shipment in cars of the through line. By such a construction we add no term to the agreement. We simply find the meaning of two words which are not self explanatory to be that which plaintiffs themselves acted on before the agreement, and for nearly if not quite a year afterwards.

I think, with deference, that the appeal should be allowed and the action dismissed.

MACLAREN, J.A.:—The present action was brought to recover damages for the alleged breach by defendants of a clause in an agreement entered into by the parties on the 1st of November, 1900, whereby *inter alia* the defendants agreed for a term of five years to ship by plaintiffs' lines all their controllable freight for points reached by those lines or their connections up to the amount of \$35,000 per annum if such controllable freight should amount to so much, and if not, then all of it.

At the trial the parties agreed that if it should be held that the plaintiffs were entitled to damages there should be a reference to ascertain the amount. The Chancellor held that the defendants had violated their agreement, but that the plaintiffs had waived or condoned such breaches up to August, 1901, and he ordered a reference to determine the damages subsequent to that date.

The dispute is only as to car-loads of freight. The defendants

claim that in cases of a short line like theirs, sending freight over trunk lines like the plaintiffs, the custom recognized at the time of the agreement was that the trunk line should send their cars for such freight to the point of shipment. The plaintiffs deny the existence of any such obligation on their part.

For about ten years prior to the agreement in question the defendants had been sending car loads of freight over the lines of the plaintiffs and their connections, the latter as a rule sending their cars to the point from which such freight was to be shipped. Sometimes, but apparently rarely, the defendants allowed their cars to go to the point of destination, but it does not appear from the evidence that the practice of transshipping from defendants' cars to plaintiffs' at the point of junction was ever adopted.

It is to be observed that the agreement is entirely silent as to how the freight in question was to be carried. Nothing is said as to whether the plaintiffs were to send their cars to the place of shipment, or whether the defendants were to send theirs on to the point of destination, or whether the freight was to be transshipped at the point or points of junction. In case either of the former methods was adopted by mutual consent no difficulty would have arisen as there was a recognized usage as to the allowance to be made for a car while it was upon the road of another company. The difficulties arose from the fact that neither the plaintiffs nor the defendants had sufficient cars to send over the line or lines of the other for such a purpose; and neither appears to have been willing to lease from companies who built cars expressly for the purpose of leasing them, those that would be necessary to enable them to handle such freight.

The evidence shews that the practice which had prevailed between these parties prior to the agreement of 1900, viz., the trunk lines as a rule sending their cars for carload shipments from points on the local line, also prevailed in the case of other lines similarly situated in Canada. If the parties contemplated a change in the method of doing such business in the future one would naturally have expected that something would have been

inserted in the agreement to indicate this change. On the contrary the agreement is quite consistent with the old method of doing such business; but I think the evidence falls short of proving the existence of a custom that would of necessity be read into and form a part of the contract. In my opinion it does not wholly exclude the alternative that the strict rights of the parties might be respectively to deliver and receive such freight at the point of junction where it would be transhipped from the defendants' cars to the plaintiffs'. If this were to be done I can see nothing in the agreement that would oblige the defendants to bear any part of the expense or trouble that would be occasioned by such transhipment or by any unreasonable detention of their cars.

In the absence of anything in the agreement imposing on either of them such an obligation I am unable to see that either the defendants or the plaintiffs were bound to send their cars over the lines of the other for or with such freight; still less was either of them bound to the other to build or lease additional cars for such a purpose.

In order to determine whether the defendants were guilty of a breach of contract let us see what were their duties and obligations to the plaintiffs under the agreement in question. By clause 7 they agreed for a consideration to ship all their controllable freight for points on the plaintiffs' lines and their connections up to \$35,000 per annum if it should amount to so much; and if it did not, then all of it. It is admitted that the shipper had the right to designate the route if he so chose. If he did not do so then I think it was the duty of the defendants to send such freight up to the amount stipulated over the plaintiffs' lines in preference to any competing line, when the rates and conditions were equally favourable.

There is no charge that the defendants did not give the plaintiffs the preference when the latter sent cars to the point of shipment to receive the goods. The sole complaint is that they shipped by other lines which sent on their cars when the plaintiffs were unable or unwilling to do so.

The defendants not being bound to send their cars over the plaintiffs' lines and it not being charged that defendants did not give plaintiffs the preference when the latter sent on their cars the only question that remains to be considered is whether the defendants should and could have sent more freight over the plaintiffs' lines by carrying it in their own cars to the points of junction where it would be transhipped to the plaintiffs; assuming that this was the way that the contract was to be worked out when neither party was willing to send its cars over the line of the other.

The plaintiffs have not always been consistent in their interpretation of the contract any more than in their methods of carrying it out. We may, I think, assume for the purpose of the present appeal that they now limit their claim to what is stated in his evidence by Mr. Ledyard, the president of the Michigan Central Company, and in their reasons of appeal that there was a quantity of coarse freight which might have been taken by defendants to points of junction and there transhipped, but which they handed over to rival companies which furnished them with cars at the points of shipment.

The onus of proving this was upon the plaintiffs, and it was incumbent on them to shew it before they would be entitled to a reference to determine the quantum of the damage suffered by them in consequence of such breach.

In this they have, in my opinion, wholly failed. Mr. Ledyard admits that in the case of certain classes of freight the shipper would object to such transshipment and that the run from points on the defendants' line to Buffalo is too short for transshipment. The evidence of the manager of the defendants' line is emphatic and uncontradicted to the effect that no shipper would send his goods in a car from which they were to be transhipped if he had the option of a through car. In this he is supported by every shipper along the line who has been examined in the case, and it is precisely what common knowledge would have led me to believe if there had been no evidence on the point.

I think under the contract it was the duty of the defendant company and its officers and servants to endeavour to persuade shippers of goods to points on the plaintiffs' lines or their connections to send their goods over these lines. It was equally their duty, however, to have informed them that in case they did so they would be transhipped at the junction; but that one or the other of the competing lines was ready and willing (when such was the fact) to forward them to their destination in through cars.

I think that "controllable freight" in the contract could only properly mean such freight as could be controlled by the defendants after they had fully and fairly stated the facts to the shippers.

If the other competing lines should discontinue the practice of sending their cars to points on the defendants' line for such freight, no doubt the defendants would be able to control much more of it than under the conditions which existed when the contract was made. If such change should occur at any time during the five years of the contract, then, no doubt, "controllable freight" would have a wider meaning and include much more than under the previous conditions. For that reason I do not think "controllable" freight can be absolutely defined or determined for the whole term by the conditions existing at the time of the contract.

After carefully going through the evidence I am unable to find that a single carload of freight was sent by the defendants over a competing line which the shipper would have permitted to be sent over the plaintiffs' lines if the facts had been fairly laid before him, and that consequently the plaintiffs have not established any breach of the contract by the defendants or shewn that they are entitled to any damages to justify a reference.

In my opinion the judgment appealed from should be reversed and the action dismissed with costs.

GARROW, J.A.:—The action was brought to recover damages

for the alleged breach of an agreement by which the defendants agreed to ship by the plaintiffs' railway all their "controllable" freight for points reached by the lines of the plaintiffs, up to \$35,000 per annum, and the breach alleged is generally, that the defendants did not ship their controllable freight as agreed.

It was admitted at the trial that the defendants had not shipped freight over the plaintiffs' lines to the amount of \$35,000 per annum, that had the plaintiffs furnished cars as requested (the real dispute between the parties), more freight would have been sent, and it was agreed that if the plaintiffs should be found entitled to recover any damages such damages should be ascertained by a reference.

The defendants' line is what is known as a local road. It has connections, however, with four trunk or through lines, viz., the plaintiffs, the G.T.R., the C.P.R. and the Wabash Railway, and all four lines were, when the agreement was made and are still, competing for the through freight originating on the defendants' line. And at that time and prior thereto, the usual custom was for the plaintiffs to supply the necessary cars to carry the goods from shipping points to destination, a custom then common to all four trunk lines, and which the other three still continue.

After the agreement was made the plaintiffs continued the custom for about nine months and then refused any longer to do so, and for the first time claimed that under the agreement it was the duty of the defendants to supply such cars.

The learned Chancellor adopted the plaintiffs' contention. In his judgment he uses the following language: "Upon the proper meaning of the agreement I think the plaintiffs are right and that its terms cannot be modified by a reference to a previous practice under different circumstances. A new relation was established by the terms of the written and sealed contract and under it the obligation undertaken by the defendant was to ship all controllable freight via the plaintiffs' for all points reached by the plaintiffs' lines and connections. Had the intention been to

give the plaintiffs only a preferential option over other competing trunk lines to obtain its foreign freight, upon sending cars to receive it, different language would have been employed to manifest this intent." And the formal judgment accordingly declares the true meaning and intent of the agreement to be "that the defendants should ship by the plaintiffs' lines and their connections all freight which could be shipped by such route as the defendants might be free to select as between the shipper and the defendants." And a reference was ordered to ascertain the damages, but limited to the period subsequent to that during which the plaintiffs had been supplying cars.

With deference it appears to me that the real question in dispute has not been at least expressly determined by the judgment now under review. The defendants did not, as I understand them, dispute that they were bound to send all "controllable freight" by the plaintiffs' lines. They can and no doubt do subscribe to every word which I have quoted from the formal judgment; but then after all, what is "controllable freight?" That is the real question. The phrase is not at all self-explanatory and is therefore properly the subject of explanatory evidence by business experts familiar with the class of business in question, several of whom were examined. From this evidence it clearly appears that it is the shipper who alone controls the route, where he has a choice of two or more. And it also clearly appears that a determining circumstance with the shipper always is the advantage of a through or continuous carriage without transshipment or breaking bulk, that in fact speaking generally, of two routes, otherwise equal, the one offering through cars, while the other refused, making transshipment necessary, the shipper would always select the former. And if he did, the local railway would be bound to follow his directions. These circumstances which are, I think, abundantly proved make it clear that "controllable freight" that is freight which the defendants could or can control is limited to such freight as is placed in cars at the point of shipment to be thence carried in the same cars without transshipment to the place of destination.

The agreement in fact made and could make no difference. The same competition continued and what was "controllable" before remained so afterwards, and by exactly the same methods, for the simple reason that the real control rests in the hands of the shipper and not of the railway company. Then what did the parties intend by the use of the term "controllable freight" in the light of surrounding circumstances?

Transshipment being out of the question owing to the objection of the shipper there were only two modes left by which the agreement could be reasonably performed—one that the plaintiffs should as theretofore continue to supply the cars as the other competing lines were doing, the other that the defendants themselves should do so. There is nothing in the agreement itself one way or the other on the subject. The learned Chancellor's opinion evidently was that the parties intended by the agreement to effect a change in this respect, but if so, would it not be reasonable to expect to find an express stipulation in it of such intention? And finding none is it not reasonable to infer that the parties did not intend such an important change, but rather to continue as before, the conditions of the competition remaining the same? That at all events is my interpretation of the agreement. And it is, I think, strongly confirmatory that such was also the interpretation of the parties themselves for several months after the agreement was made.

The other mode, that the defendants should supply the cars, thus necessitating a large increase in their car equipment, especially in the light of the fact that the other through lines were and are ready and willing to supply them, seems to me on every ground unreasonable and wholly foreign to what in my opinion the parties could have intended.

The appeal should be allowed with costs, and the action dismissed with costs.

MACLENNAN, J.A.:—This is an action brought by the plaintiffs against the defendants for the recovery of damages for

breach of a contract entered into between the plaintiffs and the defendants and a distillery company called the Hiram Walker & Sons, Limited, bearing date 1st of November, 1900.

The plaintiffs are a railway company having two lines extending from the St. Clair and Detroit Rivers, converging at St. Thomas, and thence extending to the Niagara River and Buffalo. It is what is called a trunk railway and has connection with lines in the United States, leading to the seaboard and to the Western States. The defendants are a railway company whose line extended from the St. Clair and Detroit Rivers to Ridgetown, at the date of the contract, but which has since been extended to St. Thomas, and which intersects or connects with the plaintiffs' line at several points, including a point near Windsor called Pelton, and at St. Thomas. The defendants' line has also various connecting points with other trunk lines, such as the Grand Trunk and Wabash Companies, which also connect with lines reaching the seaboard and the Western States. For brevity I shall call the plaintiff company the Southern Company, the Canada Southern being the owners, and the Michigan Central Company being the lessees of the line, and I shall call the defendants the Erie Company.

For more than ten years before the date of the agreement the Southern, Grand Trunk and Wabash were competitors for the business of the Erie destined for distant points, and those companies were in the habit of furnishing empty cars to the Erie, to be loaded by the latter at points on their line, and hauled by them to points on the other lines, and there delivered to the other respective companies. The through freight was divided between the companies in proportion to the haulage and car service.

In the year 1900 the Erie Company were extending their line from Ridgetown to St. Thomas, and were seeking certain rights of way and station ground from the Southern along their route; and one of the objects of the agreement of the 1st of November was the granting of those rights, and providing for the compensation to be received by the Southern Company therefor.

The agreement accordingly provides for the granting and conveying to the Erie Company the rights and privileges sought by them, and as part of the consideration therefor the Erie Company entered into the agreement, for violation of which this action was commenced on the 28th of November, 1902.

The agreement recites that the shareholders of the Walker Company are the principal owners of the shares of the Erie Company, and that company was therefore interested in obtaining for the Erie Company the rights and privileges which they were seeking from the Southern. The Walker Company, accordingly, by the 5th paragraph of the agreement, agree for five years to ship via the Erie and the Southern lines, all their controllable shipments of whiskey to United States points and ports, which the Southern Company and their connections can reach, on equal terms with other carriers, the delivery of the shipments to the Southern, when for the West, to be at Pelton, and when for the East, at the furthest East point, until the Erie line reaches St. Thomas, and afterwards at that point.

No question arises in this action upon this part of the agreement, but its language throws some light on the construction of the Erie Company's agreement now to be stated.

Paragraph 7, after providing that the Erie Company is to pay the market value of the land to be taken from the Southern, to be ascertained by arbitration in case of difference, provides that the Erie Company shall for five years ship, in addition to the business received from the Walker Company, by the Southern Company all their controllable freight for points reached by the Southern Company's lines up to the amount of \$35,000 per annum, if the controllable freight amounts to so much, if not then all of it, the intention being that the revenue to be derived by the Southern from the business given to it by the Erie shall be at least \$35,000, if the controllable freight will so allow; this amount shall be exclusive of the shipments made by the Walker Company.

It is remarkable that this agreement makes no provision as to

how it was to be carried out, no provision as to loading or unloading, or as to the supply or interchange or haulage of cars, nor as to the proportions in which the charges for haulage and car service should be divided. No explanation is given of the omission to provide for these things and it is said they were not discussed at all at the time of making the agreement.

After the agreement the business continued to be done just as it had been for ten or eleven years before. The Southern supplied most of the cars, and the correspondence shews that, but for occasional shortage, they would have been unwilling to supply all that were required for the fulfilment of the contract. Sometimes there were complaints that business was given to the Grand Trunk and Wabash which should have gone to the plaintiffs, and request was made that in cases of emergency the Erie would use their own cars. A scarcity of cars on the part both of plaintiffs and defendants, resulted at the end of the year in a deficiency of the stipulated supply of \$35,000 worth of freight to the plaintiffs of nearly \$9,000. This was complained of by the plaintiffs to the defendants on the 25th November, 1901, and was excused by the defendants by the fact that it had been impossible to get all the cars they had required from the plaintiffs. It was then for the first time that the plaintiffs called attention to the absence from the agreement of any stipulation respecting the supply of cars, and denied any obligation to do so, although they had been supplying all they could.

The present action seeks to recover the deficiency of revenue under the contract for the first two years, and the plaintiffs have had judgment, with a reference to ascertain the amount.

The defendants have pleaded and rely upon an alleged custom of railway companies that the trunk lines, such as the plaintiffs, should supply the cars to local lines, such as the defendants, for such business as that now in question, and claim that the agreement ought to be construed with reference to that custom. Much evidence was produced both in favour of and against the existence of such a custom. Having read the whole

of the evidence with attention, I think the learned Chancellor rightly decided that the custom was not established.

In the absence of custom then is there any other ground on which the non-supply of cars by the plaintiffs can be rested as an excuse for any neglect to deliver to the plaintiffs any freight which was within the defendants' control? It is said that the conduct of the plaintiffs, during the first year, in supplying cars to the full extent of their power, and their repeated expression of willingness and desire to do so, shew that both parties understood the agreement in that sense, and that such is its proper construction.

I think the law as to the interpretation of contracts does not permit us to go so far. The contract is clear and distinct in its terms. There is no doubt or ambiguity on its face, nor arising from extrinsic circumstances. The meaning of controllable freight is clear. It means business, that is goods, which the shipper has not himself directed to be carried by a particular line or route to its destination, what one of the witnesses called "un-routed business." The defendants agree to ship that business when received by them by the plaintiffs' line at the points named. In other words they are to carry the goods from the points on their own line where they have been received, to the points of junction on the plaintiffs' line, westward or eastward according to their destination, and then deliver them to the plaintiffs. They are not required to allow their cars to go farther than the points of junction. It was shewn that the practice was more common not to tranship at those points, but to have the goods carried to their destination, at all events eastward, without transhipment, all the way from the original point of shipment. The evidence of the presidents of the two plaintiff companies, is that they did not consider the agreement required or obliged the defendants to allow their cars to go off their own line, and Mr. Ledyard, the president of the Michigan Central, says that transhipment is of little importance, that goods going from the east to the west are nearly all rehandled at Chicago, and he does not think his

company had any claim for damages out of 100,000 packages handled.

The contract therefore being plain, certain and unambiguous on its face, and equally plain, certain and unambiguous, when applied to the subject of it for fulfilment and execution, and its meaning not being rendered uncertain by anything extrinsic, I have found no authority which would warrant us in saying that the plaintiffs were obliged to continue to supply cars for the traffic as they did during the first year. If there were such authority there would still be a difficulty, for during that time the plaintiffs supplied only so many cars as they were able, about eighty-two and a fraction per cent. of the business done, and the defendants the rest. The learned Chancellor has given the defendants a measure of relief having regard to the manner in which the contract was carried out in the first year and has directed the account to be taken of the deficiency sought to be recovered to commence on the 1st of August, 1901.

I think the appeal should be dismissed.

The plaintiffs appealed from the judgment of the Court of Appeal to the Privy Council and the appeal was argued on 10 and 11 July, 1906.*

I. F. Hellmuth, K.C., and *E. C. Cattnach*, for the appellants.

The respondents' contention that it must have been in the contemplation of the parties to the agreement that the appellants would continue to supply cars for the "controllable freight" to be shipped by the respondent company after the contract was entered into and that such alleged understanding was to control its terms is rebutted by the evidence that such a practice was only the result of the efforts of competing trunk lines to secure business, but when the business has been secured by a formal contract, the reason for the practice falls, and with it falls the practice itself.

*Present:—Lord MacNaughton, Lord Dunedin, Lord Atkinson, Sir Arthur Wilson, Sir Henri E. Taschereau and Sir Alfred Wills.

The appellants have never conceded that they were bound to furnish cars for the "controllable freight" which the respondent company undertook to ship by the appellants' lines and connections. Certain traffic officers of the appellants appear to have acted under the impression for a time that the previous practice as to supplying cars would continue, and for a time that both the respondent company and the appellants should each furnish their quota of these cars, but these were never the views of the appellants. The respondent company gave no evidence that the contrary was the understanding of the officers of the respondent company, as alleged by their statement of defence.

The meaning of the words "controllable freight" is clear and definite. The circumstance that the respondents' equipment was inefficient or inadequate for the reception or carriage of such controllable freight cannot affect or alter the meaning of such words and affords no excuse for the respondents' failure to perform their contract.

S. A. T. Rowlatt, for the respondents.

It never could have been in the contemplation of the parties that the usual course of business should be departed from after the entering into of the agreement and that these respondents were bound to increase their rolling stock for the purpose of sending through freight over the lines of the appellants' railway. The common usage and course of dealing and practice between the railways of the appellants and of the respondents was to be continued after the date of the agreement. While the controllable freight was to be sent over the appellants' railways, it did not absolve the appellants, if they desired this freight, from forwarding the necessary cars to receive such freight.

The meaning of the term controllable freight is explained by the surrounding circumstances and custom and usage at and prior to the time the agreement was entered into.

The circumstances shew that "to ship" in the seventh clause of the agreement meant "to ship by cars furnished by the plaintiffs."

At the conclusion of the argument of respondents' counsel, 11th July, 1906, the judgment of their Lordships was delivered by Lord MacNaghten.

For the reasons given by Mr. Justice Maclellan of the Court of Appeal for Ontario, in his judgment dissenting from the judgment of majority of that Court, their Lordships are of opinion that the judgment appealed from should be reversed, the judgment at the trial restored and that the respondents should pay the appellants' costs of this appeal and in the Court of Appeal.

Their Lordships will humbly advise His Majesty accordingly.

Solicitors for the appellants, *Freshfields.*

Solicitors for the respondents, *Blake & Redden.*

TRAFFIC ACCOMMODATION—CONNECTIONS.

CANADA.]

[SUPREME COURT.

THE CANADIAN NORTHERN R.W. CO. v. T. D. ROBINSON & SON.

(37 S.C.R. 541.)

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS
FOR CANADA.*Board of Railway Commissioners—Jurisdiction—Traffic accommodation—Restoring connections—3 Edw. VII. c. 58, ss. 176, 214, 253.*

On an application to the Board of Railway Commissioners for Canada, under the provisions of the Railway Act, 1903 for a direction that a railway company should replace a siding, where traffic facilities had been formerly provided for the respondents with connections upon their lands, and for other appropriate relief for such purposes:—

Held, that, under the circumstances, the Board had jurisdiction to make an order directing the railway company to restore the spur-track facilities formerly enjoyed by the applicants for the carriage, despatch and receipt of freight in carloads over, to and from the line of railway.

PRESENT: Fitzpatrick, C.J., and Girouard, Davies, Idington, Maclellan, and Duff, JJ.

APPEAL, by leave of His Lordship Mr. Justice Maclellan, from an order of the Board of Railway Commissioners for Canada, which directed the appellants to restore certain spur-track facilities for the carriage, despatch and receipt of freight in carloads, over the railway and the connection for those purposes on the lands of the respondents.

On the application of the respondents, who are coal and wood merchants, in the City of Winnipeg, in Manitoba, under secs. 214 and 253 of the Railway Act, 1903, for an order to direct the railway company to replace a siding wrongfully taken up by them from the respondents' property immediately adjoining the station, main-line and yards of the railway company in the said City of Winnipeg, or any such other part of the respondents' yard as to the Board might seem proper, or, in the alternative, that general delivery of all freight consigned to the

respondents should be made at a siding constructed conveniently near the respondents' yard, and for such other reason as to the Board might seem just, the Board made the order appealed from, as follows:—

“It is ordered—That the said railway company be, and it is hereby, directed to restore the spur-track facilities formerly enjoyed by the applicants for the carriage, despatch and receipt of freight in carloads over, to and from the line of the said railway company, and the connection for that purpose between such spur-track and the railway siding on the land of the applicants; the said railway company to have the option of constructing the siding on the applicants' land, at the expense of the applicants, or of allowing this to be done by the applicants, who shall bear the expense of making the necessary connection; and the said company to have the further option of constructing the track from such point on its line and to such point on the applicants' property as it shall think proper, said siding or spur-track to be constructed within four weeks from the date of this order, the plans of the completed work to be filed with the Board.

“This order, and the construction and use of the siding or spur-track herein provided for, are not to affect the rights of the railway company upon or to any expropriation of the applicants' property authorized by law or by any order to be hereafter made by the Board.”

The reasons given by the Board for making the said order were as follows:

“The Board is of opinion that, in taking from the applicants the sidings and rail connection formerly enjoyed by them the railway company deprived the applicants of reasonable facilities which the company should be directed to restore.

“The applicants do not apply under sec. 176 of the Railway Act, as owners of an industry, for an order to compel the railway company to construct a branch or spur-line. Their land adjoins the railway yards of the company, and it does not appear to the Board that any order is necessary to enable the rail-

way company to construct a line upon its own land up to the boundary line between its property and that of the applicants or to make connection at such boundary with a siding upon the applicants' land and transfer cars to and from such a siding.

"The Board is of opinion that it may properly regard the siding and connection, and the privilege of loading cars and delivering goods for carriage on such a siding, and of receiving and unloading goods by means thereof, as facilities within the Act.

"By its notice of the 16th November, 1904, the company stated its intention 'to discontinue the spur-track facilities.'

"The Board has carefully examined the yards of the railway company in Winnipeg, and the sidings and spur-tracks furnished for the use of those engaged in various kinds of business; and while the Board does not desire to be understood as holding that the railway company should be made to furnish similar facilities to every applicant, it considers that, in view of the previous supply of the same to the applicants and of the company's practice in so freely furnishing such accommodation to those engaged in the same and other branches of business, as well as the other facts and circumstances observed and those disclosed by other evidence, these facilities should be regarded as reasonable and proper ones, which the company should afford to the applicants.

"Under all these circumstances, the discontinuance of the former service seems to the Board to have been unreasonable. In the opinion of the Board railway companies should not be allowed to furnish and cut off such facilities capriciously.

"It does not appear to the Board that an order directing the railway company, in the general terms of sec. 253, to afford to the applicants all reasonable and proper facilities for the receiving, etc., would be sufficient, or that the authorities cited by counsel for the company are conclusive against the jurisdiction of the Board to direct specifically the continuance of previous facilities which seem to the Board to have been unreasonably discontinued."

1906, Oct. 8. *Chrysler, K.C.*, and *G. F. Macdonell*, for the appellants. The board has no power to order particular works to be done nor to interfere with the discretion of the railway company as to providing facilities: *South-Eastern R.W. Co. v. The Railway Commissioners*, 6 Q.B.D. 586; *Darlaston Local Board v. The London & North-Western R.W. Co.* (1894), 2 Q.B. 694. The Railway Act, 1903, prescribes a method, by sec. 176, to compel the construction of branch lines and thereby excludes jurisdiction on the part of the Board to order such construction otherwise than as there prescribed. Coal merchants are not owners of such an "industry" as is referred to in that section; no case of discrimination has been shewn; the Board cannot order constructions to be made by the railway company upon lands which do not belong to it, and, as the occupation of the premises in question is deemed dangerous, the railway company is unwilling to place a siding there which may have to be removed should it be deemed necessary to expropriate the land for their own protection.

Ewart, K.C., for the respondents.

1906, Oct. 10th. The judgment of the Court was delivered by

THE CHIEF JUSTICE.—This appeal should be dismissed with costs. The Court is of opinion that the Board of Railway Commissioners had, in the circumstances, jurisdiction to make the order complained of.

Appeal dismissed with costs.

Solicitor for the appellants: *G. F. Macdonell*.

Solicitors for the respondents: *Howell, Hudson, Ormond & Marlatt*.

NOVA SCOTIA. [

[SUPREME COURT.

McISAAC v. THE MUNICIPALITY OF INVERNESS.

(38 N.S.R. 76.)

BEFORE TOWNSHEND, MEAGHER AND RUSSELL, JJ.

Municipal corporation—Liability to pay for lands taken for railway purposes—Filing plan—Mistake as to immaterial matter.

Under the Act incorporating the Inverness and Richmond R.W. Co., and amending Acts, it was provided that lands required by the company for its right of way, station grounds, etc., should be vested in the company upon the filing of a plan thereof, as if the same were deeded to the company, and that the owners of the same should only have recourse for the lands taken against the municipality of the county.

By an Act passed in 1903, ch. 97, a resolution of the Municipal Council, adopted for the express purpose of settling what land the municipality was to pay for, was confirmed.

Lands of the plaintiff were taken for the purposes of the company, and a plan filed indicating the land taken, and shewing it to be land which was the subject of an award in plaintiff's favour under the Act:—

Held, that the land, being clearly marked and indicated, became the property of the company on the filing of the plan, and was properly charged up against defendant under the legislation relating to the company.

Held, also, that the liability of defendant would not be affected by a mistake in the resolution in relation to an immaterial matter.

Appeal from the following judgment of FRASER, J.:

The plaintiff sues the defendant municipality for the amount of an award made by parties appointed by the municipality, amounting to \$4,414, with interest from the 29th day of May, A.D. 1901. The award was for lands belonging to the plaintiff at Inverness, Inverness county, required by the Inverness Railway and Coal Company, Limited. It is admitted that the land required by the company for its railway track and appurtenances, was granted *gratis* to the said company, and the payment for all land so required is a county charge. But, while admitting this, the defendant municipality claim that they are only liable for the limited amount of land mentioned in the Railway Act, all of which they have paid for. The amount of land taken from the plaintiff, and now held by the railway company, was 44.14 acres, but it is contended by the plaintiff that, outside of the Railway Act, the defendants are liable under ch. 107, Acts of 1898, and ch. 97 of Acts of 1903, to the plaintiff for the full quantity taken from him.

On the construction to be put on these Acts the whole matter depends. What was the reason for the enacting of ch. 107 of the Acts of 1898? Was it intended to give the railway company larger powers? If not, there was no purpose in passing it. Section 9 enacts that: "The lands heretofore obtained, or hereafter required by the company for its right of way, station grounds, sidings and appurtenances, shall, upon the filing of a plan or plans of the same, or any of them, in the registry office in the town of Port Hood in the county of Inverness, forthwith be and become vested in the said company and its successors, as if the said lands had been deeded to the said company, and the owners or proprietors of such lands, or any of them, shall thereupon only have recourse for the purchase money thereof, or the damages arising from the taking of the said lands or any of them, to the municipality of the county of Inverness, under the provisions of the Act, ch. 83 of the statutes of 1888, and any amendment thereto."

This, I submit, went far beyond the provisions of the Railway Act. It not only made the company owners, as if they held deeds from the parties whose land had been or would be shewn on the plan or plans, but shut such owners up to recourse for the purchase money on the defendant municipality. There is no doubt that plaintiff's land was required by the defendant company under this section, nor that under schedule "A" to the Act, the defendant agreed to pay the owners. Another Act relating to the plans, chapter 97, was passed in 1903. This Act was passed for the purpose of determining the quantity of land taken, obtained, or required by the company, said company being the same as had taken, and now holds the plaintiff's land. At this date three plans had been filed by the company. Section 1 refers to plan on file and sec. 2 to plans. Both sections refer to land taken and lands taken but deviated from or abandoned, and, as sec. 9 of ch. 107, Acts of 1898 mentions plans, I think ch. 97 (1903), and ch. 107 (1898), when read together, cover the three plans filed previous to the last Act. The municipality

were anxious to have the privileges granted in 1898 settled and determined, and by said Acts became liable to the plaintiff for the lands taken from the plaintiff and now vested in the Inverness and Richmond Railway Company, Limited. This, certainly, was the view of defendant, for they appointed three appraisers, who, on the 22nd day of January, A.D. 1902, awarded the plaintiff \$4,414 for the 44.14 acres taken and now held by the said company. I am strengthened in this view from the fact that any other construction would deprive the plaintiff from any compensation for property taken from him. Both Acts were passed at the instance of the municipality, and the defendant ought not to be prejudiced by their action. There will be judgment for the amount of the award, with interest from the date thereof, and costs.

1905, Jan. 27th. *A. A. McKay* and *J. Matheson*, in support of appeal. The arbitrators have included in their award property not required by the company. The statutes taken with the plan and the award constitute the submission and award. Acts of 1887, ch. 60, secs. 26, 22; R.S.N.S. 3rd series, ch. 70; Acts of 1888, ch. 83, secs. 7, 8; Acts of 1898, ch. 107, secs. 9, 13. From 1888 to 1898 the Railway Act applied to the taking of lands for the purposes of the railway. L.R. 8 Ch. 125. Acts conferring privileges must be construed strictly against the parties obtaining them. If the words are ambiguous every presumption is to be taken against the company and in favour of the individual. 4 Bing. 448; 4 Myl. & Cr. 416; Acts of 1903, ch. 97. The only plan on file, at the time of passing of this statute and the resolution, which shews land of the Broad Cove Coal Company contains only 23 acres of the plaintiff's land. The word "plans" used in sec. 2, refers to plans of lands which have been abandoned.

H. Mellish, K.C., and *H. G. McDonald*, *contra*. R.S.N.S., 3rd series, ch. 70, sec. 11. Acts of 1898, ch. 107, sec. 9 was not to enable the railway to go on the land. This chapter was intended

to do away with the necessity of the application to the commissioner. R.S.N.S., 5th series, ch. 53. Acts of 1903, ch. 97 interprets and applies sec. 9 of 1898, ch. 107. The only limitation on the lands to be taken by the company is that they should be required. There is evidence that this land was required by the company for railway purposes.

A. A. McKay, in reply.

1905, March 18th. RUSSELL, J.:—I do not find it necessary to refer to the arguments that have been addressed to the Court on the proper interpretation of the Acts relating to the defendant company previous to the one passed in 1903, ch. 97. This Act was passed for the purpose of confirming a resolution of the municipal council adopted for the express purpose of settling what land the municipality was to pay for. The lands of the plaintiff, for which the award sued on in this case was made, had certainly been taken by the defendant company for the purpose of their undertaking. I mean, of course, as a matter of fact, waiving any question of law which I suppose it was the very purpose of the statute to set at rest. A plan had been filed clearly indicating the land, and that it consisted of fifty-one and twenty-nine hundredth acres, which it is explained includes seven and a quarter acres for right of way and the forty-four acres which are the subject of the award.

The only difficulty that is made about the matter is that the resolution on which the legislation is based, when referring to this plan, seems to take it for granted that the Broad Cove Coal lands, which are also mentioned in the resolution, are marked on the plan as the lands of the Broad Cove Coal Company. There were, at the time the resolution was passed, a number of plans on file covering the lands of the Broad Cove Coal Company, referred to, and in which the land was marked as the land of the said company, and it would be a very natural mistake to assume that the plan on which the plaintiff's land was indicated, and which also shewed the Broad Cove Coal Company's lands,

would have them marked thereon as the land of the company. I think that this is a wholly immaterial matter. The land of the plaintiff is clearly marked and indicated and I think there can be no possible doubt that, on the filing of the plan, it became the property of the company. If so, it has been properly charged up against the municipality under the legislation relating to the company, and the proper judgment has been given in favour of the plaintiff for the amount awarded. The appeal should, in my opinion, be dismissed with costs.

TOWNSEND, J., concurred.

Appeal dismissed with costs.

CANADA.]

[SUPREME COURT.

THE COUNTY OF INVERNESS v. JAMES McISAAC.

(37 S.C.R. 75.)

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Municipal corporation—Railway aid—Construction of agreement—Expropriation—Description of lands—Reference to plans—R.S.N.S., 1900, ch. 99—3 Edw. VII. ch. 97 (N.S.).

A municipality passed a resolution by which it agreed to pay for lands required for the right of way, station grounds, sidings and other purposes of a railway as shewn upon a plan filed under the provisions of the general railway Act. At the time of the resolution there were four such plans filed, each shewing a portion of the land proposed to be taken for these purposes, and including, in the aggregate, a greater area than could be expropriated for right of way and station grounds under the provisions of the Acts applicable to the undertaking of the railway company. The Legislature passed an Act confirming such resolution. To an action by the owner of the land taken, on an award fixing the value of that in excess of what could be so expropriated, the corporation pleaded no liability on account of such excess, and also, that there was no specific plan on file describing the land:—

Held, affirming the judgment appealed from (38 N.S. Rep. 76), that the first defence failed because of the Act confirming the resolution, and, as to the second, that the four plans should be read together and considered to be the plan referred to in such resolution.

PRESENT:—Sir Elzéar Taschereau, C.J., and Girouard, Davies, Idington and MacLennan, JJ.

APPEAL from the judgment of the Supreme Court of Nova Scotia, 38 N.S. Rep. 76, affirming the judgment of Mr. Justice Fraser by which the plaintiff's action was maintained with costs.

The municipal corporation of the county of Inverness, N.S., passed a resolution, in January, 1902, by which it agreed to aid the construction of a railway by providing and paying for lands, at Broad Cove Mines, required by the railway company for right of way, station grounds, sidings or other railway purposes as included on a plan on file under the provisions of the Acts by which the company had authority to expropriate lands for the purposes of their undertaking. This resolution was confirmed and declared binding upon the municipality by a special statute, 3 Edw. VII. ch. 97 (N.S.). At the time when the resolution was passed there were four such plans filed, as complying with the terms of the general railway Act, each shewing portions of the lands so required; they were supplementary and complementary to each other and, taken together, shewed the whole of the land taken from the plaintiff (about fifty-one acres) in respect of which the present controversy arose. Upon an arbitration two awards were made; the first in regard to the ground occupied by the permanent way and station building, about seven acres, being the maximum which could be expropriated for such purposes under the Nova Scotia general railway statutes; and the second for the remainder of the lands, about forty-four acres, taken from the plaintiff for terminal purposes of the railway at Broad Cove Mines.

The municipality refused to pay the amount of the second award on the ground that the area thus taken was in excess of the quantity of land which might be expropriated under the statutes applicable to the railway, and that no such area being shewn upon any specified plan it, consequently, was not included in the reference made to the plan mentioned in the resolution.

An action to recover the amount of this second award was maintained at the trial by Mr. Justice Fraser, and his decision was affirmed by the judgment now appealed from.

Dec. 14, 1905. *Newcombe*, K.C., and *A. A. Mackay*, for the appellant.

Mellish, K.C., and *H. Y. MacDonald*, for the respondent.

The judgment of the Court was delivered by

Dec. 22, 1905. DAVIES, J.:—I think this case turns entirely upon the meaning of the resolution passed by the municipality of Inverness in January, 1902, and which was subsequently, in 1903, confirmed and made law by the Legislature of Nova Scotia.

The previous filing of the plans by the railway company may not have operated to pass the title of the whole fifty-one acres of McIsaac's land, attempted to be expropriated by the railway company, by reason of the limitations imposed upon this mode of expropriation by the general railway Act. I do not find it necessary to express any opinion on this point. But, when the statute of 1903 was passed confirming the municipal resolution and making it a part of the statute law of the province, the question is reduced to the meaning of that resolution and enactment and whether or not they provided for and included the lands of the respondent which the company had clearly attempted to expropriate and take.

As to the actual taking, surveying and fencing of the fifty-one acres there is no doubt, and as to the fying of a plan by the company, shewing the whole fifty-one acres to have been taken many months before the resolution was passed, there is no dispute. The only question argued at length before us was whether this plan so filed could be considered as within the specific terms of the resolution.

Four distinct plans had been filed, and I have no difficulty in acceding to the argument of Mr. MacDonald, adopting, on this point, the judgment of Fraser, J., that the whole four plans

must be read together as they are capable of being read, each being in some respect supplementary and complementary to the other, and together constituting the plan referred to in the resolution as the railway plan on file. If this is done and the enactment of the resolution construed, as it must be, as a statutory compact, binding alike on the company and the municipality, then all doubt as to the quantity of plaintiff's land taken is at an end.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *Jas. D. Matheson.*

Solicitor for the respondent: *H. Y. MacDonald.*

NOVA SCOTIA.]

[SUPREME COURT.

MCISAAC ET AL. V. THE INVERNESS RAILWAY AND COAL CO.

(38 N.S.R. 80.)

BEFORE MEAGHER, FRASER AND RUSSELL, JJ.

Arbitration and award—Lands, etc., taken for railway purposes—Authority of arbitrator to act—Failure to give notice before entry—Trespass—Liability of company.

By the Acts of 1902, ch. 104, the recompense to the owner of land taken for railway purposes, and for the value of earth, stones, gravel, etc., removed, was required to be fixed by three arbitrators, one chosen by the company, another by the owner or proprietor, and, where these were unable to agree as to the amount of their award, a third, to be appointed by the two arbitrators first nominated. The company's engineer wrote to M., who had previously acted for the company, requesting him to ascertain whether plaintiffs had arranged their title to the gravel pit at Loch Ben in such a way that the arbitrators could get to work and, if so, to let them know that he (M.) was prepared to act, "and asked them to appoint their man so that you two, if you cannot agree to the valuation, may select a third." He added, "I will send an agreement of arbitration which each one can subscribe to, or, if they have one already drafted, you can forward it here for approval." No agreement was sent by the engineer, and none was forwarded for approval by M., but, acting on the letter received, M., in company with plaintiff's nominee, met and investigated the damages, and, with C., who was appointed third arbitrator, signed an award for the amount of which action was brought:—
Held (Russell, J., dissenting on this point), that the letter written by the

company's engineer, in the absence of anything in the statute as to how the arbitration was to be conducted, or the steps to be taken previous to inquiry, was as effective as any agreement, even if such were necessary, and the company were bound by it.

Held, also, that defendants, having failed to proceed in the regular way, by giving notice to the proprietors of the purposes for which they entered, and for which they could only enter after notice, were trespassers and liable as such.

APPEAL from the following judgment of TOWNSEND, J.:

This is an action on an award made in favour of plaintiffs for land taken by the defendant company under the provision of the Acts of 1902, ch. 104, sec. 2. That the defendant company entered upon the land, nearly eight acres, and removed the soil, and cut down the trees for the purpose of constructing the road is not in dispute. It is proved that an award purporting to be made under the Act, signed by the three arbitrators, was filed in the office of the Registrar of Deeds at Port Hood on the 7th day of May, 1902, awarding plaintiff \$960.00. The defence to this part of the case is: (1) That the defendants' arbitrator had no authority from defendant company to enter upon said arbitration, nor to make the award. (2) That no notice was given to the company of the arbitration proceedings, and that they were not present in consequence, and had no opportunity of having witnesses before the arbitrators, or being otherwise heard. That all the proceedings were invalid and the award was void. McKeen acted for the defendant company, but the only authority he had was a letter from defendant company's chief engineer, produced in evidence, and, without going into details, I am of opinion that it conferred no authority upon him to act as arbitrator until a written agreement had been entered into which was first to be submitted to Mr. Sinclair. I am also of opinion that the Act contemplates an arbitration in which all parties were to be heard, and not merely an appraisalment. The award made under the conditions in evidence was, therefore, clearly invalid, and plaintiffs cannot recover upon it.

The plaintiffs, in the alternative, sue for the trespass, and seek

to recover the value of the land by proof before me. At the trial I expressed strong doubt whether this could be done. On looking into the Act, I am convinced there is only one way of fixing the value of the land so taken, that is to say, by the mode fixed by the Act, which is most explicit in its terms. It reads: "The recompense for the injury to the land, etc., etc., and for damages to the proprietors or possessors, shall be referred to the determination of three, etc., etc." If they are by law required to fix the value and determine the recompense, it is clearly not competent for the Court to do so in this action. It is true defendant company, in the first instance, laid itself open to an action for trespass in entering and working on the land without giving plaintiffs notice as required by the statute, but I think plaintiffs waived this irregularity by agreeing to the arbitration. They did not insist on their right in this respect, nor in any way put the want of notice forward as a violation of their property, but, with full knowledge of what had been done adopted proceedings under the statute for having the damages fixed by arbitration. Under such circumstances, I think they waived any illegality in the original entry. I therefore am of opinion the plaintiffs must fail in this action, and I give judgment for the defendant company with costs.

1905, Jan. 11th. *D. McNeil* and *A. A. McKay*, in support of appeal. The question of want of notice is not raised by the pleadings. The award cannot be attacked collaterally upon this ground. L.R. 2 C.P. 384; 7 H. & H. 508; 10 Moo. P.C. 587. The defendants entered wrongfully. What occurred afterwards does not constitute a waiver of the irregularity. Russell on Awards, 8th ed., secs. 312 and 314.

H. Mellish, K.C., and *H. McInnes*, *contra*. We are not setting up misconduct of the arbitrators, but the illegality of the award. *Turnbull v. Brown*, 5 B. & C. 384. Our objection goes to the root of the award. There is no valid appointment of the arbitrator who purported to act for the defendant. The waiver

was not the arbitration but leave and license. R.S.N.S., 3rd series, ch. 70, secs. 12, 16. As soon as an agreement is entered into for a new arbitration the plaintiff is estopped from bringing his action for trespass. *Smith v. Trowsdale*, 3 El. & Bl. 83; *Rollins v. Townsend*, 118 Mass. 224.

A. A. McKay, in reply. The statute requires a written notice. As a matter of fact there was no notice whatever before defendants went into possession, nor was any plan filed until seven months after the trespass and we, therefore, were not in a position to force them to arbitration. The letter to the arbitrator is capable of two constructions and the defendant is not to get the benefit of a doubtful construction. R.S.N.S., 3rd series, ch. 70, secs. 17, 18; Acts of 1887, ch. 60, secs. 22, 26.

1905, March 18th. FRASER, J.:—The plaintiffs sue on an award and, in the alternative, for lands taken and for damages for breaking and entering these lands and cutting and carrying away trees, bushes, gravel, and for other damages sustained by them from the acts of the defendant company.

The award was made on the 1st day of May, A.D. 1902, and was duly signed by the three arbitrators. The defendants object to its validity because the arbitrators were not duly appointed, and proceeded without notice to either of the parties.

It may be granted that there should be a submission under the Act enabling the plaintiffs to obtain compensation for the land taken and damages sustained, and the question in the case is, was the written authority, given by Mr. Sinclair to Mr. McKeen, such power as was equivalent to a submission for arbitration.

Up to March, 1902, the defendant company were bound by the clauses inserted in their charter, taken from ch. 70, Revised Statutes, 3rd series, as printed in the appendices of the 4th series. By ch. 104, Acts of 1902, passed the 27th day of March, and previous to the date of the award, a change was made, and the "recompense for injury to the land and the value of the earth,

stones, gravel or other material dug or taken away, or trees, bushes, logs, poles or brushwood cut down or carried away for railway purposes, and for damages" to the proprietor or possessor, were to be referred to three arbitrators, one chosen by the company, another by the owner or proprietor, and these two, if they could not agree, were to appoint a third. The company had a year and more previously entered upon the plaintiff's lands as they were permitted to do. But they were bound to notify the possessors or proprietors of the land before entering. As this was a requirement of the statute it should have been a written notice. This was not done, but the company's failure to do so should not prejudice the plaintiffs. The notice was to give information to the proprietors or possessors of the purposes of the company in entering upon the lands. The company were represented by their engineer Mr. Sinclair, who acted for them in all matters in connection with the construction of their railway, as well as in all matters relating to the taking of land or any materials that were necessary to be taken to complete the railway they were building.

On the 31st day of March, 1902, Mr. Sinclair wrote the following letter to Mr. McKeen, who had acted previously for the defendant company, at least in one case, respecting damages claimed against the company:

"Will you please ascertain if the McIsaacs of Strathlorne, have arranged their title to the ballast pit at Loch Ben in such a way that the arbitrators can get to work. If they have, please let them know that you are prepared to act, and ask them to appoint their man so that you two, if you cannot agree as to the valuation, may select a third.

Do nothing in the case of Dr. Gunn at present. I want to get the McIsaac matter out of the way first, and then we can take up his claim afterwards. I will send an agreement of arbitration which each one can subscribe to, or if they have one already drafted you can forward it here for approval. I expect to get away every week, but something turns up to keep me here, and you had better take the case up without me."

Acting on this letter, Mr. McKeen, in company with Mr. Daniel R. Campbell, the plaintiff's nominee, met to investigate the damages sustained by the plaintiffs on the lands taken. They could not agree, although there does not seem to have been very much in dispute between them, and they appointed Alexander A. Campbell as the third arbitrator.

I am satisfied from the evidence that, on the ground, they agreed upon the amount of their award, which they all subsequently signed, and for the payment of which the action is brought.

Did the letter written by Mr. Sinclair to Mr. McKeen empower him to act? It must be remembered that there is nothing said in the statute as to how the arbitration is to be conducted, or the steps to be taken previous to enquiry. A submission is not made necessary. One of the arbitrators is to be "chosen" by the defendants. When Mr. Sinclair said, "Let them know that you are prepared to act, and ask them to appoint their man," does he not in effect say: I choose you under ch. 104, Acts of 1902, as the company's arbitrator, to determine the recompense to be paid for all injuries sustained by the plaintiffs for which the defendants are liable under the statute to the plaintiffs. He speaks of sending an agreement. It was never sent. He closes by instructing Mr. McKeen that he had better take up the case without him. Mr. McKeen did so and, with the plaintiff's arbitrator and a third named under the Act, made the award sued on. This was as effective as any agreement, even were such necessary, and the company are bound by it. Price of land, not title, was the issue. The arbitrators could make their award as they did without hearing evidence. The defendants, by not giving notice, were trespassers, and it may be a question whether or not the plaintiffs might not recover without any arbitration proceedings.

The appeal should be allowed with costs, and judgment entered for the plaintiffs for the amount of the award with interest and costs.

MEAGHER, J. (oral) :—Substantially I agree with the opinion just read. I agree that the appeal should be allowed with costs and judgment entered for plaintiff upon the award, with costs of action and trial, except costs upon the issue as to trespass, as to which I think defendant should have costs. The appointment of Mr. McKeen was not conditional, and none of the grounds urged by defendant were pleaded. They did not deny the appointment of McKeen, if it were the subject of a plea, even if true in fact. If I thought plaintiff not entitled to recover on the award, I would think him entitled to recover on his claim for trespass.

RUSSELL, J.:—The award on which the action in this case is brought has been attacked as invalid because authority was not given by the defendant company to the person who acted as arbitrator on behalf of the company. That authority is contained in the following letter from the chief engineer of the company:

(The learned Judge here read the letter set out in the judgment of FRASER, J., *supra*.)

The contention of the defendant is that this was not a final authorization, but was written with the intention and meaning that, before entering upon his duties, Mr. McKeen should be commissioned by a formal agreement of arbitration, to be drawn up and subscribed by the parties. Plaintiffs read the letter from Sinclair to McKeen in the sense that the reference to the agreement of arbitration to be so drawn up is connected with the case of Dr. Gunn, whose property had also been taken for the purposes of the railway. There were two McIsaacs and only one Gunn and if the reference to the agreement had been connected with Dr. Gunn's case the writer instead of saying "if they have an agreement already drafted you can forward it for approval" would have written "if he has one already drafted." This, of course, taken by itself, would be far from conclusive, but the whole paragraph shews that it was the McIsaac matter, and not the Gunn matter, that the writer had on his mind.

Nothing was to be done at present with the case of Dr. Gunn. He did not therefore ask McKeen to send any draft of an agreement in that case. I think there can be no doubt that he was referring to a draft agreement to be forwarded in the McIsaac case, and that the authorization was not complete until such an agreement was submitted for approval and was approved.

This is an objection that goes to the root of the matter and renders the award a nullity. The contention of the plaintiff, therefore, that it cannot be made a matter of pleading, but can only be used as a ground for setting aside the award, cannot be sustained.

It may well be that no agreement was necessary under the statute, and that such an agreement would only help to complicate the matter. But the question is whether McKeen had been definitively appointed by the company, and, even if Sinclair was under an erroneous impression as to the necessity for an agreement, that would not affect the question. He did not make a final appointment of McKeen. There was a *locus poenitentiae* until an agreement was forwarded and approved, and McKeen had no authority to communicate the fact of his appointment excepting as subject to this qualification. If Sinclair had made the communication himself directly to the plaintiffs, of course, it would not have been controlled by any secret reservations between himself and McKeen, but the only authority McKeen had to announce his appointment was an authority subject to this limitation by which, therefore, I think the plaintiffs were bound.

The plaintiff sues in the alternative for a trespass and the claim on this footing has been dismissed because the statute has provided a mode of ascertaining the damages by means of an award of arbitrators appointed under sec. 16 of ch. 70 of the Revised Statutes (third series), amended with respect to this railway by ch. 104 of the Acts of 1902. I agree that, where the proper proceedings have been taken, the statutory method of assessing the damages is the only one available. But the defen-

dants did not proceed in the regular way. They omitted to give the notice to the proprietors and possessors of the land before entering for the purposes for which they could lawfully enter only after due notice given. This was a trespass for which a right of action immediately arose, and I do not understand that a right of action, once vested, can be released by anything short of accord and satisfaction, of which I see no evidence in this case. I think the plaintiff's action for damages should have succeeded, and, if there were satisfactory evidence of the damages on which this Court could found a judgment, I should agree to a judgment for the plaintiff. I do not think that an abortive award is evidence such as should be received for this purpose.

The award is not printed, but I assume that it covers the whole value of the land intended to be taken. If the title to the land has passed the proposed judgment for the plaintiff may do no substantial injustice, but I think there is more than a grave doubt about this; and that, in the laudable effort to do justice to the plaintiff, there may be danger of compelling the defendant company to pay for the land and still be liable to repeated actions for trespass if they continue to exercise acts of ownership over it.

In my opinion the appeal should be allowed with costs, and a new trial ordered.

Appeal allowed with costs.

CANADA.]

[SUPREME COURT.

THE INVERNESS RAILWAY AND COAL COMPANY

v.

ANGUS McISAAC AND MURDOCH McISAAC.

(37 S.C.R. 134.)

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

*Expropriation of land—Arbitration—Authority for submission—Trespass—
2 Edw. VII. ch. 104 (N.S.).*

By statute in Nova Scotia, if land is taken for railway purposes the compensation therefor, and for earth, gravel, etc., removed, shall be fixed by arbitrators, one chosen by each party and the third, if required, by those two. A railway company intending to expropriate, their engineer wrote to M., who had acted for the company in other cases, instructing him to ascertain whether the owners had arranged their title so that the arbitration could proceed, and, if so, to ask them to nominate their man, who, with M., could appoint a third if they could not agree. The engineer added, "I will send an agreement of arbitration which each one can subscribe to, or, if they have one already drafted, you can forward it here for approval." No such agreement was sent by, or forwarded to, the engineer, but the three arbitrators were appointed and made an award on which the owners of the land brought an action:—

Held, reversing the judgment appealed from, 38 N.S.R. 80, that as the company had not taken the preliminary steps required by the statute which, therefore, did not govern the arbitration proceedings, the award was void for want of a proper submission.

The company entered upon land and cut down trees and removed gravel therefrom without giving the owners the notice required by statute of their intention to take their property. The owners, by their action above mentioned, claimed damages for trespass as well as the amount of the award.

Held, that as the act of the company was not authorized by statute the owners could sue for trespass and as, at the trial, the action on this claim was dismissed on the ground that such action was prohibited there should be a new trial.

PRESENT:—Sir Elzéar Taschereau, C.J., and Girouard, Davies, Idington and MacIennan, JJ.

APPEAL from a decision of the Supreme Court of Nova Scotia, 38 N.S.R. 80, reversing the judgment at the trial in favour of the defendants.

The facts of the case are sufficiently set out in the above head note.

1905, Dec. 12 and 13. *Newcombe*, K.C., and *Mellish*, K.C., for the appellants.

Daniel McNeil and *A. A. MacKay*, for the respondents.

1905, Dec. 22. THE CHIEF JUSTICE and GIROUARD, J., concurred in the judgment allowing the appeal and ordering a new trial.

DAVIES, J.:—I agree with the judgment of Russell, J., and would allow the appeal and order a new trial.

The appellant company entered upon the plaintiffs' lands, cut down and carried away trees, excavated a gravel pit, and otherwise damaged the property.

They had a legal right to do all this provided they had proceeded under the statute authorizing the construction of the road and given the plaintiff the statutory notices of their intention to take his property.

They did not, however, do this and, therefore, in all that they did with respect to plaintiffs' lands they were trespassers only.

If they had given the necessary notices defining what property they intended to take and had entered and taken the property in assertion of that right I should have been inclined to hold that the letter of the railway company's engineer to Mr. Sinclair might be construed as a sufficient and complete appointment of the company's valuator or arbitrator. In that case the arbitration would have been under the statute which in connection with the notice would contain a complete submission, and define not only what the arbitrators were to value, but the method of procedure.

I agree with Meagher, J., that in such a case the latter words of the letter might be read as authorizing Mr. McKeen to "manage all the appraisal proceedings for them as well as to act as appraiser" because there could not be then any doubt as to what property or damages the arbitrators were appraising.

But as the defendants had not given the necessary notices

and the statute did not apply, and no submission of any kind was executed defining what the arbitrators were to value, whether the plaintiffs' lands taken by the company, if any were taken, or merely the damages caused by digging the gravel pit referred to in Sinclair's letter or the latter damages plus those caused by the trees cut down and destroyed, I cannot agree that there was any legal or binding arbitration or award; or that the letter could be construed as in itself an authority to act until there had been an agreement defining what the arbitrators were to value. But I have no doubt whatever of the plaintiffs' right to recover for all the damages they have sustained at the company's hands against the defendants as trespassers and which damages, I think, should have been assessed under the alternative claim of the plaintiff at the trial.

While the appeal must be allowed with costs in this Court our judgment should be the one which the Court appealed from should have given, namely, that proposed by Russell, J., the costs of the appeal to the Supreme Court of Nova Scotia to be paid by the defendants and the costs of the first trial to be costs in the cause.

IDINGTON, J.:—The appellants are a railway company, that by the law of Nova Scotia at the times in question had a right, upon giving of notice under the statute, to have done all that was done by them, and in question here.

They without such notice and without any other authority had entered upon respondents' lands and committed trespasses in the way of taking timber and gravel.

Some talk took place, after some of these trespasses, between one of the respondents and the agent of the company, that indicates an intention to have an arbitration in respect of these trespasses and of further appropriations by the company of the respondents' property of both land and gravel, but nothing definite was arrived at.

There was nothing from which either party could not in law

have receded. The respondents could have sued for the trespasses.

There was no express license for the continuation of such trespasses.

There was nothing passed between the parties that could in any way be said to have defined the extent to which the company had a right to go, or expected and intended to go.

About a year later, on the 20th day of July, 1901, the appellants filed a plan by which they indicated an intention to expropriate the land in question, but the extent of their intended expropriation thereby disclosed did not cover all the land over which they had trespassed.

There were thus existing in law at the time when the alleged submission to an arbitration, which resulted in the award sued upon, was written, at least three distinctly separate claims, relative to which disputes might arise, and for settlement of which one or more arbitrations might furnish appropriate remedies; one for the trespasses done before anything passed between the parties, another for those done after the talk between them, for which there might be said to have been given, by one of the respondents, an assent that might possibly be held to have been as to him a license, to do what was done thereafter, but did not constitute a bargain between all the parties.

The damages, arising from these later acts thus assented to, could not be measured upon any principle of vindictive damages, though what arose from the earlier acts might, by reason of the high-handed methods adopted, well have such measure applied in regard to them.

Then there was a third claim, for the price of, or compensation for the acquisition desired by the company, of the fee simple in the land, in respect of which the plan was filed.

There may not have been any such power of expropriating the fee simple as the company thought there was. There is no doubt a provision under which the company might have entered for the purposes of taking gravel, without seeking to acquire the

fee simple in the land from which the gravel was to be taken.

It does not become necessary in the way this case strikes me to decide whether or not there was such a power of expropriation as the company believed there was.

It is sufficient for my present purpose to point out that this company, clearly in good faith, believed that they had such power of expropriation, and that it was in light of that belief that their agent carried on his negotiations with the respondents and proceeded to consider the business of the proposed arbitration when he wrote the letter I am about to quote.

If ever there existed need for a clear, comprehensive and well considered submission defining exactly what arbitrators were expected to pass upon, this remarkable jumble of a variety of causes of action, resulting from illegal and unbusinesslike acts of the company together with intentions to acquire property by virtue of such a proceeding, resting upon statute or agreement, seemed to demand it.

Yet we have an attempt made by this suit to rest an award, said to relate to some or all of these matters against the appellants, upon nothing but the following letter, written by an agent of appellants:

TORONTO, CANADA, March 31st, 1902.

Lewis McKeen, Esq., Mabou, C.B.;

Dear Sir,—Will you please ascertain if the McIsaacs of Strathlorne have arranged their title to the ballast pit at Loch Ben in such a way that the arbitrators can get to work. If they have please let them know that you are prepared to act, and ask them to appoint their man so that you two if you cannot agree as to the valuation may select a third.

Do nothing in the case of Dr. Gunn at present. I want to get the McIsaac's matter out of the way first, and then we can take up his claim afterwards. I will send an agreement of arbitration which each one can subscribe to, or if they have one already drafted, you can forward it here for approval. I ex-

pect to get away every week, but something turns up to keep me here, and you had better take the case up without me.

Yours truly,

Dict. A.S.

ANGUS SINCLAIR.

It seems that the man to whom the letter was addressed never answered it, but proceeded without further authority, with some one named by respondents, to nominate a third man. And the three, thus constituted so-called arbitrators, without notice to the company or hearing evidence or counsel or agent on behalf of the parties except the respondents, awarded that the appellants pay the respondents \$957 together with \$1.00 each to said arbitrators. The award is not before us. What it covers or purports to cover is left for us to guess until produced.

There is not the slightest doubt but that the company's agent who talked over the matter with the respondent Murdoch McIsaac intended to acquire the land, and that the arbitration he suggested was to cover that acquisition.

His evidence shews that, and is not contradicted.

The plan filed would indicate that also.

The pleadings indicate that the award was in relation to what had been taken from the land, or injury to the land, but not the value of the land itself.

There is no means of being certain from the evidence whether the arbitrators considered land, or gravel and damage to land, as combined in submission and award.

It seems abundantly clear from the letter quoted that the title to the land had been in question and was present to the writer's mind.

The terms of the letter itself, and the facts, may indicate that land as well as gravel were to have been considered.

It seems hopeless to try and support any such award upon a submission so clearly indicating that it was not a final document, but that if the respondents would name a man a proper submission would be drawn up and signed.

It is useless to try, as was urged, to reject the latter part of

the letter or to impute it only to matters concerning Dr. Gunn and his claim.

This latter part of the letter refers to the possibility that “*they* have one already drafted” and if they had “*you can forward it here for approval.*”

But as the proposal on the writer’s part, to send an agreement of arbitration, comes after the interjected sentence, “Do nothing in the case of Dr. Gunn at present” we are asked to attribute these later remarks to Dr. Gunn’s business and not to that of the respondents.

I strongly dissent from that proposed method of interpreting a document.

But for this argument, and what appears in the court below, I would not have thought it possible to claim any but the one meaning for this letter, and that clearly to be, as I certainly never have doubted it meant, to have proper articles of agreement settled before proceeding at all with arbitration.

Surely the consideration the parties had in mind, those the so-called arbitrators bore in mind, and the numerous legal difficulties surrounding the relations of the parties in regard to this property, ought to have been thought of by all concerned before adopting this kind of authority for the disposal of such matters in difference as had arisen between those parties.

I am quite sure a moment’s consideration of all those things would have stayed those arbitrators. Such methods of arbitration as they adopted ought not to be encouraged.

The judgment on this award ought to be set aside and judgment be entered for plaintiffs in respect of the trespasses and the case go back for assessment of the damages arising from such trespasses with costs of appeal to the company here and possibly in the court below, and costs of the action and of the reference to be in the discretion of the Judge who assesses the damages.

I do not, however, dissent from the disposition made of the costs.

MACLENNAN, J., concurred in the judgment allowing the appeal and ordering a new trial.

Appeal allowed with costs.

Solicitor for the appellants: *W. H. Fulton.*

Solicitor for the appellants: *J. D. Matheson.*

ONTARIO.]

[ANGLIN, J.

LEES v. THE TORONTO AND NIAGARA POWER COMPANY.

(12 O.L.R. 505.)

Company—Expropriation—Incorporation of Provisions of Railway Act as to Sufficiency of Notice—Immediate Possession—3 Edw. VII. ch. 58 (D.)

The defendants had, under their special Act, power to acquire "any privilege or easement required by the company . . . over and along any land, without the necessity of acquiring a title in fee simple thereto"; and the Act defined "land" as including any such privilege or easement, etc. In giving notice of expropriation the defendants did not state whether it was the fee simple, or merely some easement or privilege over the land which they sought to acquire, but only that they proposed to acquire the land "to the extent required for the corporate purposes of the company":—
Held, that such notice was too uncertain a foundation for expropriation proceedings, and the defendants were not entitled to a warrant for immediate possession under sec. 170 of the Railway Act of 1903, 3 Edw. VII. ch. 58 (D.).

THIS was a motion by the defendants to dissolve an injunction restraining them from entering upon lands and premises of the plaintiffs, on the ground that the provisions of the Railway Act of 1903, 3 Edw. VII., ch. 58 (D.), relating to expropriation of lands, had not been complied with.

The motion was argued before ANGLIN, J., in Weekly Court, on September 6th, 1906.

R. B. Henderson, for the defendants, contended the notice of expropriation given was sufficiently specific and the other proceedings regular under the provisions of the Railway Act, 1903, and that that was the Act governing the matter: R.S.C. 1886 ch. 1, sec. 7, sub-sec. 51; *Davidson v. Toronto and Niagara Power Co.*, per

Falconbridge, C.J.K.B., January 17, 1906, not reported; that in any event it was in the discretion of the Court to grant the relief asked: *Hendrie v. Toronto, Hamilton and Buffalo R.W. Co.* (1895) 26 O.R. 667, 27 O.R. 46; followed in *Maclean v. James Bay R.W. Co.*, Street, J., February 20, 1905, not reported.

R. McKay, for the plaintiffs, contended that under the defendants' Act of incorporation, 2 Edw. VII. ch. 107 (D.), the provisions of the Dominion Railway Act, 1903, did not apply, as specific sections of the Railway Act, 1888, 51 Vict. ch. 29 (D.), in force at the time of the passing of 2 Edw. VII. ch. 107 (D.), were incorporated, and that the filing of the plans and expropriation proceedings generally should have been taken under the Act of 1888, and not under the Act of 1903; and that the notice of expropriation was not sufficiently definite, as it did not give notice that the lands were to be taken in fee simple.

September 8. ANGLIN, J.:—Motion to dissolve an injunction restraining defendants from entering upon lands and premises of the plaintiffs. This injunction was originally granted because of defects in expropriation proceedings instituted by the defendants. They now allege that by fresh proceedings they have cured these defects, and they claim to be entitled to a warrant for immediate possession, under sec. 170 of the Railway Act of 1903, 3 Edw. VII. ch. 58 (D.).

When the present motion was launched it seems clear that the defendants were not in a position to sustain it. They have since filed plans and given the requisite notice by newspaper advertisements, under sec. 152 of the Railway Act, as is shewn by material filed by leave upon the argument.

The learned Chief Justice of the King's Bench has held in *Davidson v. Toronto and Niagara Power Co.* (January 17, 1906), that the provisions of the Railway Act of 1903, corresponding to the sections of the Railway Act of 1888, which are enumerated in the special Act of the defendant company, 2 Edw. VII. (D.), ch. 107, must now be deemed to be incorporated in this special

Act in lieu of the repealed provisions of the former Railway Act. This decision precludes any consideration of Mr. McKay's able argument in support of his contention that the enumerated sections of the Railway Act of 1888 still apply to the defendant company.

But Mr. McKay objects to the new notices of expropriation given by the defendants, on the ground that they do not define the interests in the plaintiffs' lands which the defendants seek to acquire. He also contends that, the notices prescribed by sec. 171 of the Railway Act of 1903 not having been given, the defendants are not entitled to warrants under sec. 170.

While it may be held, in the case of a railway company not enjoying such special powers as are conferred on the defendants by sec. 21 of the 2 Edw. VII. ch. 107 (D.), that under a notice for the expropriation of lands, without definition of the interest to be taken, the owner should understand that the acquisition of the fee simple is intended, it by no means follows that a like notice given by a company which has power to acquire "any privilege or easement required by the company for constructing the works authorized by this Act or any portion thereof over and along any land, without the necessity of acquiring a title in fee simple thereto," and whose special Act defines the word "land" as including any such privilege or easement, etc., is open to no other construction.

The notices of expropriation given by the defendants do not state whether it is the fee simple of the plaintiffs' lands, or merely some easement or privilege over and along them, which they seek to acquire. On the contrary, these notices intimate that the company proposes to acquire the lands described in the notices "to the extent required for the corporate purposes of the company." It may well be that these purposes only require the expropriation of the privilege or easement of a right of way for the poles and wires of the defendant company, and not the acquisition of the title in fee simple.

In my opinion such notices are too uncertain to serve as the foundation for proceedings instituted to effect forcible deprivation of property.

I do not find either in *Hendrie v. Toronto, Hamilton and Buffalo*

R.W. Co., 26 O.R. 667, 27 O.R. 46, or in *Maclean v. The James Bay R.W. Co.*, decided by Street, J., on February 20th, 1905, both cited by Mr. Henderson as authorities for the granting of a warrant under sec. 170 of the Railway Act without proof of notice under sec. 171, anything which would countenance such a course. In both these cases orders to continue injunctions were refused upon terms. There is not, so far as I can discover, in the report of the former case, or in the order in the latter case, any suggestion of the granting *in invitum* of a warrant for immediate possession. For my part, I entertain a very strong view that the extraordinary power conferred by sec. 170 should only be exercised upon proof of strict compliance with the requirements of sec. 171, and that the presence of the parties in court to answer another motion affords no ground for dispensing with a notice which is made a condition precedent to jurisdiction, and which, quite within their rights, the plaintiffs here decline to waive.

Not only because the defendants were not in a position to sustain their motion when launched, but also for the other reasons indicated, I must decline to dissolve the injunction, and I dismiss the defendants' motion with costs to be costs to the plaintiffs in any event of this action.

EXPROPRIATION—COMPENSATION.

This subject has previously been dealt with in Canadian Railway Act (Annotated) under the appropriate headings and the law has been from time to time collected in cases reported and notes thereto in earlier volumes of the Canadian Railway Cases. Some recent notes on provincial legislation affecting awards; interest on awards; costs of arbitration and filing plans, appear in 3 Can. Ry. Cas. pp. 120 *et seq.* The remedy for taking lands is referred to in the same volume at pp. 393-398; compensation for lands injuriously affected and compensation generally are dealt with in 4 Can. Ry. Cas. 33 and the form and legality of notices of expropriation in 5 Can. Ry. Cas. pp. 28 and 29.

The principles upon which compensation should be fixed are re-stated by Mr. Justice Idington in *Dodge v. The King*, 38 S.C.R. 149, at p. 155, where, in a judgment adopted as the judgment of the Court, he lays down the rule as follows: "The market price of lands taken ought to be the *prima facie* basis of valuation in awarding compensation for land expropriated. The compensation for land used for a special purpose by the owner, must usually have added to the usual price of such land a reasonable allowance, measured by possibly the value of such use, and at all events the value thereof to the using owner, and the damage done to his business carried on therein or thereon, by reason of his being turned out of possession," and at page 158 he says, "The compensation must rest, not on what such a block may be worth to the Crown for the peculiar purpose involved in its acquisition, but upon the loss the owner suffers by the Crown taking it."

FARM CROSSINGS.

CANADA.]

[BOARD OF RAILWAY COMMISSIONERS.

JACOB WRIGHT V. MICHIGAN CENTRAL RY. CO.

Farm Crossings—Railway Act, sec. 253—Railway Act, 1903, sub-sec. 2, sec. 198.

Wright having purchased lands on both sides of the Canada Southern Railway after the line was constructed, for which no farm crossing had been furnished, applied to the Board for a farm crossing over the railway. Without this crossing an inconvenient route was necessary to reach the lands of the owner across the railway:—

Held, by the Chief Commissioner following *Ontario Lands & Oil Co. v. Canada Southern Ry. Co.*, 1 Can. Ry. Cas. 171, that the applicant had no absolute legal right to the crossing; that it could only be granted by the Board in the exercise of the discretion given by sec. 253 of the Railway Act (sub-sec. 2, sec. 198 Railway Act, 1903); that the applicant should, therefore, bear the cost of its construction and maintenance and the company should receive reasonable compensation, but,

Held, by the majority of the Board that the railway company must construct and maintain at its own expense an adequate and satisfactory farm crossing over the railway on Wright's farm.

This application was dealt with by the Board after correspondence with the parties and an inspection of the locality by their engineer.

13th February, 1907. THE CHIEF COMMISSIONER:—This is an application by Jacob Wright for a farm crossing over the line of the Canada Southern Railway Company on Lot twenty-nine, Concession five, in the township of Enniskillen, in the county of Lambton, Ont. Wright is the owner of the land on both sides of the railway. An engineer of the Board was sent to inspect the locality, who reported that the applicant had no farm crossing, and that the only way to reach the portion of his land lying to the north of the railway was by means of his neighbour's lands north of the concession line, necessitating a long and out-of-the-way route. The engineer stated that, from the information he could gather, it appeared that when the railway was built the lands were owned by the Crown, but that they were subsequently surveyed and sold to the original owner. The applicant admits the

truth of these statements. The railway company says that the lands were surveyed and patented before the construction of the railway, but that the right of way across the lot was conveyed to the company without reservation before Wright acquired the land on each side of the railway. The company claims that, under its original Act of incorporation, it was not bound to grant farm crossings to the owners of lands adjacent to its right of way, and that the subsequent legislation does not impose upon the company that liability; but while not admitting the jurisdiction of the Board to require the making of a farm crossing for the applicant, the company expresses its willingness that such an order be made upon the terms of the applicant bearing the cost of construction and maintainance and paying such sum as the Board thinks reasonable and proper for the privilege, taking into consideration the attendant liabilities in connection therewith.

In the case of the *Ontario Lands and Oil Company v. Canada Southern Ry. Co.*, 1 O.L.R. 215, 1 Can. Ry. Cas 171, Meredith, J., decided, in a case similar to the present, that the Canada Southern Railway Company was not bound under, its Act of incorporation and the general Railway Act in force when the railway was built, to grant farm crossings, and that the Dominion Railway Act of 1888, which was enacted after the construction of the company's railway, did not apply to cases in which the railway had been previously constructed on land conveyed to the company and the owner of the adjoining land had purchased subsequently to such conveyance, as, in his opinion, the railway could not be said to be carried over the land of a person where such person did not acquire the property until after the railway was constructed. I agree with Meredith, J., in thinking that the decision of the Supreme Court of Canada, in *Vezina v. The Queen*, 17 S.C.R. 1, conclusively established that, under the general Railway Act in force when the Canada Southern Company was incorporated and when its line was constructed, a company was not bound to

grant farm crossings over its line where a right thereto was not reserved in the grant or otherwise agreed to by the company; and I am also of opinion, with him, that where, prior to the passing of the Act of 1888, a person had acquired lands on opposite sides of a railway, across which his predecessor in title had then no right of crossing, the Act of 1888 did not operate to give that right to the new owner. In my opinion also the Act of 1888 cannot properly be construed retroactively so as to apply to a railway previously constructed on lands vested absolutely in the company. Section 191 of the Act of 1888 provided—as did section 198 of the Act of 1903—that “every company shall make crossings for persons across whose lands the railway is carried, convenient and proper for the crossing of the railway,” etc. According to my interpretation, this provision is applicable only to cases in which the railway has been carried across a person’s land since the enactment of the Act of 1888. I have formed this opinion after consideration of the jurisprudence in the Province of Quebec, and particularly the cases of *Bolduc v. Canadian Pacific Ry. Co.*, Q.R. 23 S.C. 238, 3 Can. Ry. Cas. 197 and *Grand Trunk Ry. Co., v. Huard*, Q.R. 1 Q.B. 501.

For the purposes of the application, therefore, it does not appear material to ascertain whether the railway was constructed before or after the grant from the Crown. I think that the applicant has no absolute legal right to the crossing, and that it can be granted by the Board only in the exercise of the discretion given by section 253 of the Railway Act (sub-section 2 of section 198 of the Railway Act, 1903), which provides as follows: “The Board may, upon the application of any landowner, order the company to provide and construct a suitable farm crossing across the railway, wherever in any case the Board deems it necessary for the proper enjoyment of his land on either side of the railway, and safe in the public interest; and may order and direct how, when, where, by whom, and upon what terms and conditions such farm crossing shall be constructed and maintained.”

Under the report of the engineer I think that we may pro-

perly find that the crossing is necessary for the proper enjoyment of the applicant's land on either side of the railway, and that it would be safe in the public interest; but as such an order is one to which the applicant is not entitled of right, and as it which belongs absolutely to the railway company, and would involve some danger to the company's trains, any expense of construction and maintenance should be borne by the applicant and the company should receive reasonable compensation.

HON. MR. BERNIER:—As I have already expressed my opinion with regard to farm crossings, I have only to dissent. Would be of opinion that the company should undertake to open, construct and maintain such crossing at its own expense.

DR. MILLS:—From the report of an engineer of the Board in this case, it seems clear that Mr. Wright's application for a farm crossing should be granted; and the only question is, at whose expense is the crossing to be made and maintained.

After full consideration of the principle involved and its wide application to Crown and company lands in the western provinces and elsewhere, I am of the opinion that farm lands everywhere, actually occupied or to be occupied, carry with them the right of free passage (saving natural obstacles) from any one part of a lot to any other part of the same lot, which lot is or is to be occupied and worked as a farm; and that when a railway company or other corporation, for its own purposes and advantage, infringes upon this natural and fundamental right, it should do so with the clear understanding that it will, when constructing its line or at some later date, be compelled to provide and thereafter maintain, at its own expense, at least one adequate and satisfactory farm crossing on every lot or farm which it crosses.

Therefore, I concur in the judgment of the Deputy Chief Commissioner, that the Michigan Central Railway Company, as the successor of the Canada Southern Railway Company, should

provide and maintain at its own expense an adequate and satisfactory farm crossing, at a point to be agreed upon, on the farm of Jacob Wright, known as Lot 29, Con. 5, in the township of Enniskillen, county of Lambton, Ont.

THE CHIEF COMMISSIONER:—I am of opinion that, under section 253 of the Railway Act (sub-section 2 of section 198 of the Railway Act, 1903), the Board has jurisdiction to make an unconditional order requiring the railway company to construct the farm crossing in question; and such an order must go in accordance with the opinions of the majority of the Board.

NOTE.

See in re Cockerline and Guelph & Goderich R. W. Co., a previous decision of the Board upon sec. 198 Railway Act, 1903, now sec. 253 Railway Act, Re Armstrong and James Bay Ry. Co., 5 Can. Ry. Cas. 313 and 306 and cases there noted.

TAKING RAILWAY LANDS.

CANADA.]

[BOARD OF RAILWAY COMMISSIONERS.]

IN RE GUELPH AND GODERICH RY. CO. AND GRAND TRUNK RY. CO.

Taking Railway Lands—Powers of Board on Application—Compensation
—Railway Act, 1903, sec. 137.

The Guelph and Goderich Ry. Co. applied to the Board under sec. 137 of the Railway Act, 1903, for authority to take possession of, use and occupy land of the Grand Trunk Ry. Co. along the harbour of the town of Goderich. The latter company opposed the application claiming that they were likely to require for their business in the future two additional sets of tracks upon that land. The land in question was upon a hillside and the construction of the two additional tracks would cut away a strip of land required for the proper support of the tracks which the Guelph and Goderich Railway Company wished to lay upon the land required from the Grand Trunk.

Held, that the Board is empowered by sec. 137 of the Railway Act, 1903, to authorize one railway company to occupy and use the lands of another, even to the serious loss and detriment of the latter, due compensation being made therefor, but such injury should be avoided except where the public interest imperatively demands it.

This application was heard at Ottawa on 25th March, 1905.

A. H. Macdonald, K.C., for the Guelph and Goderich Ry. Co.

M. K. Cowan, K.C., for the Grand Trunk Ry. Co.

July 17, 1905. CHIEF COMMISSIONER:—The Guelph and Goderich Railway Company has applied for authority to take possession of, use and occupy land of the Grand Trunk Railway Company at Goderich. The land sought to be taken is a portion of a strip along the harbour of the town of Goderich, upon the water side of which the Grand Trunk Company has a number of tracks and other improvements. The portion sought to be taken is not at the present time occupied by any tracks of, or used in any way by, the Grand Trunk Company; but the Grand Trunk Company claims that it is likely to require in the future, for its business at that point, two additional sets of tracks upon that land. The land is upon a hillside rising up from the harbour,

so that the portion sought to be taken by the Guelph and Goderich company is much higher than that on which the present tracks of the Grand Trunk Company are placed.

The Guelph and Goderich Company desires to take and use not only the portion which will be absolutely required for its tracks, but also a further strip for support.

If the Grand Trunk Company should construct, on or about the level of its present tracks, two additional tracks, this would involve the cutting away of the hillside to such an extent that a supporting wall would require to be constructed at much expense.

The Chief Engineer of the Board has examined the locality, and reports that the use and occupation of a certain portion should be granted to the Canadian Pacific Railway Company, leaving room for only one additional track for the Grand Trunk Railway Company. The estimate of our engineer is that one additional track would meet all the reasonable requirements of the Grand Trunk Railway Company for the future, and that the quantity which he recommends to be given over for occupation by the Guelph and Goderich Company is the least that would be reasonably required for its tracks and their support.

Railway companies have been granted by the legislature very great powers to take property without the consent of the owners. In the exercise of these powers they frequently cause serious discomfort and inconvenience to individuals, and in many cases deprive parties of property urgently needed for business purposes.

By sec. 137 of the Railway Act one railway company may "for the purpose of obtaining a right of way over or through lands owned or occupied by any other railway company, and for the purpose of obtaining the use of the tracks, stations, or station grounds, of another railway company, or for the purpose of constructing and operating its railway, take possession of, use or occupy any lands belonging to any other railway company, and use and enjoy such right of way, tracks, stations or station

grounds, subject always to the approval of the Board first obtained, and to any order or direction which the Board may make in regard to the exercise, enjoyment or restriction of such powers or privileges. 2. Such approval may be given upon application and notice, and after hearing, the Board may make such order, give such directions, and impose such conditions or duties upon either party, as to it may appear just or desirable, having due regard for the public and all proper interests."

This enactment places railway companies under liability to be subjected to similar treatment to that which, by the general expropriation clauses of the Act, they are empowered to mete out to private individuals. Parliament desires that the way should be kept clear for the construction of additional railways, and that existing railway companies shall not be allowed to monopolize the lands advantageously situated for railway purposes at any particular point.

In my opinion the Board is empowered by this legislation to authorize one railway company to occupy and use the lands of another even to the serious loss and detriment of the latter due compensation being made therefor; but I consider that care should be taken to avoid such injury, except where the public interest imperatively requires it.

It is, of course, difficult to estimate in advance the probable requirements of the distant future. On such applications endeavour should be made to allow for future development; and, if it can be avoided, encroachment upon the property likely to be reasonably required for the purposes of the existing railway should not be authorized. On the other hand, the Board must guard against the use by an existing railway company of an exaggerated estimate of its probable requirements for the purpose of placing at a disadvantage an in-coming competitor.

There is nothing to shew to the Board that, at the present time, there is any need of even the one additional track for the purposes of the business of the Grand Trunk Railway Company in Goderich or the neighbourhood, or that there is any prospect

of such a development at that point as will, for a very long period of time, if ever, require the addition of a second track. If that time should ever arrive, the Board, or such body as shall then exercise its present authority, can make such provision as may seem meet.

The matter has been so long standing that it should be disposed of, notwithstanding the request of the Grand Trunk Railway for further time to develop its plans. Under existing circumstances it does not appear to me that any hardship will be caused to that company by its being placed in such a position as to require it to adapt its plans to the situation that will be created by the proposed order.

I think the order should go authorizing the Guelph and Goderich Railway Company to take possession of, use and occupy the lands estimated by the engineer of the Board to be required for its purposes, such compensation therefor to be paid by that company as shall be fixed by agreement between the two companies, or, in case they cannot agree, by the Board.

While the Board has power, by the statute, to rescind or vary any of its orders, I think it well that it should be directly expressed by this order that it is subject to be varied or rescinded by the Board. The parties will thus have full notice that such change may be made as future developments shall require.

TAKING RAILWAY LANDS.

CANADA.]

[BOARD OF RAILWAY COMMISSIONERS.

PRESTON AND BERLIN STREET RY. CO. V. GRAND TRUNK RY. CO.

Railway Crossings—Authority of the Board—Provincial Railway—Municipal Franchises—Railway Act, 1903, secs. 137, 177 and 187.

The Preston and Berlin Street Railway Co., operating a provincial railway under municipal franchises, applied to the Board, under section 177 of the Railway Act, 1903, for authority to construct two crossings over the Grand Trunk Railway Co.'s tracks, or in the alternative for an order directing the Grand Trunk to shift its tracks so as to afford the applicants access to their freight terminals in the town of Waterloo. It was suggested on behalf of the town of Waterloo that an order might be made for this purpose under section 187.

Held, 1. That the application for the crossings must be refused as not proper in the public interest.

2. And that the Board, under the Railway Act, 1903, has no authority to compel the Grand Trunk, a Dominion railway, to shift its tracks for the convenience of the applicants, a Provincial railway.

3. And that the Board, under section 137 of the Railway Act, 1903, had not jurisdiction to grant to a Provincial railway company power to take, use or occupy the lands of a Dominion railway company.

THE CHIEF COMMISSIONER:—The application to be dealt with at the present time is simply one to allow the two crossings at Caroline and Erb Streets, and in the public interests the application must be refused. The Preston and Berlin Street Railway Company previously applied to the Board for leave to use a small portion of the Grand Trunk Railway Company's land in order to dispense with the crossing. The company was incorporated solely under the provincial laws and the provision in the Railway Act giving the Board power to authorize the use by one company of the railway tracks or the land of another, applies only to a railway within the authority of the Board, one authorized by Act of the Dominion Parliament, or declared to be a work for the general advantage of Canada.

The suggestion that the Board attempt to exercise a power to compel the railway company, which already had a crossing over the streets, to move that crossing, not for the protection

of the public, but as a matter of convenience to another railway, might be worthy of some consideration, but does not arise on the present application.

The town might succeed in an application to have the tracks of the Grand Trunk Railway Company moved and have the highway extended so as to cover the land of the Grand Trunk between the corner of the Seagram building and the tracks and a portion of it that is not already a highway. I would not say what view the Board would take of it, nor how far it could be done with safety apart from the question of its being a proper exercise of the power under that section 187 that has been referred to. If the town wishes to do that they should make an application.

The application was renewed at the town of Waterloo on 7th May, 1906, after the Board had an opportunity of examining the locality.

C. R. Hanning, for the Preston & Berlin Street Railway Co.,
A. B. McBride for the Town of Waterloo, *M. K. Cowan*, K.C.,
for the Grand Trunk Ry. Co.

THE CHIEF COMMISSIONER:—The Board finds that the inspection recently made of the locality has only confirmed its previous view that the crossings ought not to be allowed to be made, and that the only apparent reason for such crossings is to enable the electric railway company to use property on which it desires to have its terminal station and yard. The Board does not consider this a sufficient reason for adding these two additional crossings so close together, and upon such a curve, to the other sources of danger in Waterloo: and the fact that the railway company has chosen to so locate its terminal property, or that the council of the town of Waterloo is unwilling to allow the electric railway company to place its tracks on other streets, does not seem sufficient to force the Board, in the exercise of the discretion conferred upon it by law, to a different conclusion from that which it deems proper in the public

interest. The Board regrets that the Grand Trunk Railway Company does not see fit to allow the electric railway company sufficient space for the running of its cars between Mr. Seagram's property and the line of the Grand Trunk Railway, but the Board finds that it has no authority to compel the Grand Trunk Railway Company to allow the Preston and Berlin Company the use of any portion of the land of the Grand Trunk Railway Company.

This being so, any change in the line of the Grand Trunk Railway Company at the street crossings would be of no benefit to the Preston and Berlin Company.

NOTE.

For other similar cases under secs. 137 (sec. 102 of the Railway Act, 1888), and 177 of the Railway Act, 1903, now secs. 176 and 227 of the Railway Act, authorizing the taking of railway lands, a crossing of or junction with the lines of one railway company by those of another, see *Grand Trunk Railway Co. v. Lindsay, Bobcaygeon and Pontypool Railway Co.*, the *Stamford Junction* case and the *Merritton Crossing* case, 3 Can. Ry. Cas. 174, 256 and 263, and notes thereto. The Board may, in cases arising under either section, against the sanction and without the will of a railway company, permit the taking of its lands or that a junction with or crossing of its line be made by another railway company, where the public interest demands it.

HIGHWAY CROSSINGS.

CANADA.]

[BOARD OF RAILWAY COMMISSIONERS.

IN RE NIAGARA, ST. CATHARINES AND TORONTO RY. CO.

THOROLD STREET CROSSINGS.

*Highway Crossings—Branch Line—Operation Along Highway—Street Railway
—Leave of Municipality—Railway Act, 1903, sec. 184.*

The Niagara, St. Catharines and Toronto Ry. Co. applied to the Board for leave to cross certain streets in the town of Thorold by a branch line already authorized by the Board.

The municipality contended that the applicants' railway is a street railway or tramway, or operated as such, and that, under the Railway Act, 1903, sec. 184, the leave of the municipality must be obtained by by-law before a street railway or tramway can cross its streets.

Held, upon the evidence, that the proposed branch line is not a street railway or tramway, and that sec. 184 only applies to operation along highways and not to crossings thereof.

THE town of Thorold opposed the application of the Niagara, St. Catharines and Toronto Ry. Co. for leave to carry a branch line of the railway, authorized by order of the Board, across certain streets in the town of Thorold. It was contended on the part of the town that the company's railway was a street railway or tramway, or was operated, or to be operated, as a street railway or tramway; and that leave could not be given to carry it across streets in the town without the consent of the town by by-law.

Henderson, for the applicant Co.

A. C. Kingston, for the Town.

June 19, 1906. THE CHIEF COMMISSIONER:—Upon the evidence, it does not appear to me that the proposed branch line is a street railway or tramway, or is intended to be operated as such. The main line of the company's railway is constructed upon the company's right of way; it does not run along the streets in Thorold, and its cars do not stop at street corners to take up or let off passengers, but only at its own stations. The line is used for freight traffic as well as for passenger traffic.

In the year 1902, by authority of the Parliament of Canada and

of the Legislature of the Province of Ontario, the Niagara, St. Catharines and Toronto Ry. Co. acquired the property and undertaking of the Port Dalhousie, St. Catharines and Thorold Electric Street Ry. Co., Limited, a company incorporated under the authority of the Legislature of the Province of Ontario for the construction and operation of an electric street railway; and the Niagara, St. Catharines and Toronto Ry. Co. now operates the line of that street railway in and upon the streets of Thorold and elsewhere; but the branch line authorized by order of this Board, and which the company desires to carry across these streets, is to be taken from what is called the main line of the company's railway, and not from the street railway system.

Further, the prohibition in sec. 184 of the Railway Act, 1903, is against the authorization of the operation of a street railway or tramway along a highway. In the present case, the application is for crossings only. In one case, the crossing is to be at an angle which would place the railway upon the street for a considerable distance; but it seems to be none the less a crossing. The evident intention of the Act is to require railway companies proposing to operate a street railway system and to use the streets as their right of way, to procure the assent of the municipality for that purpose. The Act authorizes a company to carry its railway across streets by leave of the Board; and the only qualification is, that the consent of the municipality is required where the railway is a street railway or tramway which runs along, and not merely across, the streets.

Upon the report of the engineer, I think the application should be granted.

There does not appear to be any necessity for protection by gates or watchmen, though there might be some limitation upon the rate of speed across these streets.

HIGHWAY CROSSINGS.

CANADA.]

[BOARD OF RAILWAY COMMISSIONERS.

CANADIAN PACIFIC RY. CO.

V.

TOWNSHIP OF NORTH DUMFRIES.

Crossing and Diverting Highways—Taking Gravel—Term of Years—Railway Act, 1903, sec. 2 (s.) and (bb.), secs. 118 (l.) and (q.), 119, 141, and 186.

For the purpose of taking gravel from lands on both sides of a highway, a railway company applied to the Board for authority to construct and operate tracks over such highway for a term of years, to close to public traffic a portion of such highway, and to open a new road in lieu thereof.

Held, that it is not necessary to comply with sec. 141 where the company can acquire the lands containing the gravel and has a right of way thereto, that for such purposes the company may exercise the same powers for crossing and diverting highways as for the construction and operation of its main line, and that a diversion of the highway may be authorized for the time necessary to exhaust the gravel pit upon proper terms for safeguarding the interests of the municipality and of the public. Railway Act, 1903, sec. 2 (s.) and (bb.), secs. 118 (l.) and (q.), 119, 141 and 186 referred to.

THIS application was heard at the town of Galt, on November 6th, 1905.

Angus MacMurchy for the applicants.

J. B. Dalzell for the township of North Dumfries.

D. Guthrie, K.C., for private land owners.

THE CHIEF COMMISSIONER:—The Canadian Pacific Ry. Co. has applied to the Board for authority to construct and operate railway tracks for a term of years over the present line of a highway in the township of North Dumfries, Ontario, to close to public traffic a portion of such highway, and to open in lieu thereof a new road. The township and some property owners oppose the application.

The company has, at present, a spur track running from its main line at Ayr to a mill, and from this spur line sidings run into a ballast pit, crossing in their course the highway in question.

The company has made agreements with the owners of lands adjoining the gravel pit on one side of the highway and adjoining its mill spur on the other side of the highway for the acquisition of further lands containing gravel.

The railway company now desires to excavate farther back into the side of the hill to a depth much below the level of the highway, and, for that purpose, to cut away the soil of the highway to a similar depth; and for the period of fifteen years, which is estimated to be the time that will be required for the purpose of such excavation in ordinary course, to divert the highway so that it will run around the company's land, and be crossed on one side by the spur leading from the station at Ayr to the mill and gravel pit.

It has been objected that the Railway Act does not authorize the diversion of a highway, except for the purpose of its being crossed by or carried beside the main line of the railway.

By sec. 2, sub-sec. (s), of the Railway Act, 1903, the expression "railway" means any railway which the company "has authority to construct or operate, and includes all branches, sidings, stations, depots, wharfs, rolling stock, equipment, stores, property, real or personal, and works connected therewith, and also any railway bridge, tunnel, or other structure which the company is authorized to construct."

By sec. 2, sub-sec. (bb), the expression, "the undertaking," means the railway and works, of whatsoever description, which the company has authority to construct or operate.

By sec. 118: "The company may, for the purpose of the undertaking, subject to the provisions in this and the Special Act contained:— . . .

"(l) Divert or alter, as well temporarily as permanently, the course of any such river, stream, watercourse or highway, or raise or sink the level thereof, in order the more conveniently to carry the same over, under or by the side of the railway. . . .

"(q) Do all acts necessary for the construction, maintenance and operation of the railway."

By sec. 119: "The company shall restore, as nearly as possible,

to its former state, any river, stream, watercourse, highway, water-pipe, gas-pipe, sewer or drain, or any telegraph, telephone or electric lines, wire or pole, which it diverts or alters, or it shall put the same in such a state as not materially to impair its usefulness."

By sec. 186: "Upon any application for leave to construct the railway upon, along, or across an existing highway . . . the Board may by order grant such application upon such terms and conditions as to protection, safety and convenience of the public as it may deem expedient, or may order that the highway be carried over or under the railway, or be temporarily or permanently diverted, and that such works be executed, watchmen or other persons employed, or measures taken as under the circumstances appear to the Board best adapted to remove or diminish the danger or obstruction arising or likely to arise therefrom."

Section 141 provides a method by which a company desirous of laying tracks, spurs, or branch lines to lands on which stone, gravel, etc., required for the construction or maintenance of the railway, or any part thereof, are situated, and unable to agree with the owner of the land for its purchase, may acquire the lands on which such material lies and a right of way over intervening lands for such tracks, spur or branch line.

Gravel is necessary for properly ballasting a line of railway and keeping it in a proper state of efficiency. The ordinary method of obtaining such gravel for use on a line of railway is to construct spurs or sidings to points where the gravel is to be obtained, and to carry it therefrom by railway locomotives and cars to the line on which it is to be used.

Sec. 141 shews that the acquisition of lands on which gravel is to be found, and the construction thereto of spur lines, are within the powers intended by Parliament to be exercised by a railway company.

It appears to me that, where the railway company can acquire the lands containing the gravel, and have a right of way thereto, it is not necessary to take the steps prescribed by sec. 141. In my opinion, for the purposes of such spur line, the railway company

can exercise the powers for the diversion of highways given by the Act, as well as for the purpose of the construction and operation of the main line of railway.

In order to the proper excavation of the gravel pit to the depths to which the gravel goes, and for the proper operation of gravel trains, the railway company requires to cut through the highway more than once. It desires to cut it away entirely, for a considerable distance, to the depth of the excavation in the gravel pit. A single cutting across the highway, of the ordinary width for one track would be insufficient. In order to keep the highway on its present site in a fit state for travel, a long bridge or series of bridges would be necessary.

It appears to me that the railway company, in lieu thereof, can properly be authorized to divert the highway at this point for the period of time estimated by it to be necessary for the purpose of exhausting the gravel pit.

By the municipal law of Ontario, the municipality in which the highway is situated is entitled to dispose of gravel in the soil of a public highway, and to maintain trespass against any person taking the same. The railway company does not desire to deprive the municipality of the gravel in the soil of the highway, and is willing to restore the site of the highway to a satisfactory condition for public travel at the conclusion of its operations.

I think that the diversion should be allowed upon proper terms for safeguarding the interests of the municipality and of the public.

Ordered : That applicant company be authorized to construct and operate its tracks for a period of fifteen years, over the highway in the township of North Dumfries, and to close a portion of the said highway for the said period of fifteen years, upon the terms and conditions: (a.), that the company make diversions to the south and north by opening new roads in lieu of the closed portion; (b.), that the company join its gravel pit siding, or sidings, to the main track of its branch line in such a manner that only one railway track will be crossed by the road diversion to the south on the side between the gravel pit and the town of

Ayr; (c.), that a board fence 8 feet high be constructed along the east and north-east boundaries of the gravel pit to prevent trouble to traffic on the diversions to the south and to the north, provided that in case the company opens the diversions or new roads at a distance of at least 100 feet from the east and north-east boundaries of the company's line, it shall be relieved from building the said fence; (d.), that the company give to the township the gravel in and under the highway diverted, or an equivalent amount from some other part of the pit free of charge; (e.), that the company at the earliest practicable date—not later than fifteen years from date of order—restore the said road diverted and leave the same in good condition for public traffic.

RAILWAY CROSSINGS.

CANADA.]

[BOARD OF RAILWAY COMMISSIONERS.]

WINDSOR, ESSEX AND LAKE SHORE RAPID RY. CO.

V.

MICHIGAN CENTRAL RY. CO.

Level Crossing—Subway—Provincial Railway—Work for the General Advantage of Canada—Approval of Route and Location Plans—Ontario Electric Railway Act, R.S.O. (1897), ch. 209, sec. 27—Railway Act, 1903.

The Windsor, Essex and Lake Shore Rapid Ry. Co. applied to the Board to rescind or vary its order for a subway under the tracks of the Michigan Central Ry. Co. at Essex, and substitute a level crossing.

Upon the evidence the Board reluctantly accepted the recommendation of the chief engineer in favour of a level crossing. The applicants were originally incorporated under the provisions of the Ontario Electric Railway Act, R.S.O. 1897, ch. 209. After obtaining an order for a crossing, their railway and works were declared by 6 Edw. VII. ch. 184 (Dom.), to be works for the general advantage of Canada.

Held, that the route and location plans need not be approved by the Board under the Railway Act, 1903, before the variation of the former order for a crossing could be made.

THIS was a crossing application under the circumstances mentioned in the judgment.

Leggatt, for the applicants.

Cattanach, for the respondents.

May 17, 1906. THE CHIEF COMMISSIONER:—Section 27 of the Electric Railway Act of Ontario, R.S.O. 1897, ch. 209, does not appear to limit the power of the railway company to construct its line or make the crossing applied for.

The requirement that plans be filed with the Provincial Minister of Public Works, appears to be a condition only to the right to expropriate property, and not to the construction or operation of the railway.

Section 4 of the company's amended special Act, 5 Edw. VII. ch. 110 (Ont. 1905), authorizes the company's railway to cross the railway of any other company upon a level with the consent of

such company, or with the authority of the Board of Railway Commissioners for Canada.

This enactment cannot bind this Board, or fetter it in the full exercise of its discretion under the Dominion Railway Act. We must consider the application as in the case of any other application for a railway crossing, and determine, in our discretion, whether it is proper to allow a level crossing or not.

November 20, 1906. Last Spring the Windsor, Essex and Lake Shore Rapid Ry. Co., a company authorized by Act of the Legislature of the Province of Ontario to construct a line of railway from a point in or near the city of Windsor, Ontario, through certain townships and towns (among others the town of Essex) in the county of Essex, Ontario, applied to the Board for leave to carry its line across the tracks of the Canada Southern Ry., in the town of Essex, at rail level. That application was opposed by the Michigan Central Ry. Co., lessee of the Canada Southern Ry. The application was heard and oral evidence taken thereon at Windsor, and the Board visited Essex and examined the location of the proposed crossing. Subsequently one of the assistant engineers of the Board reported that, on account of the proposed crossing being located at the east end of a sharp curve where trains were visible for only a short distance, and owing to the fact that a large number of fast through trains ran past the proposed place of crossing, he did not think that a crossing at rail level should be permitted there. The engineer further advised that a subway could be constructed under the main line at a reasonable expenditure about one-third of a mile farther west, with a rail level crossing of the Amherstburgh branch which connects with the main line at Essex.

After careful consideration, the majority of the Board were of opinion that the Windsor, Essex and Lake Shore Ry. Co. should not be allowed to cross the tracks of the Canada Southern Ry. at rail level, but that permission should be given to construct a subway under the main line and to cross the Amherstburgh branch at rail level. In accordance with this view, the Board made an order giving leave to construct the subway mentioned.

Shortly after the announcement of the Board's conclusion and the making of the order, the applicant company asked for a further hearing of its application, claiming that it had not previously received notice that the Michigan Central Ry. Co. proposed to urge the construction of a subway, and that it was not prepared with proper evidence upon that point, and claiming that further evidence would shew that, on account of the nature of the locality, a subway crossing was not feasible there. The company was directed to make formal application to rescind or vary the Board's order, and the Board sent the assistant engineer to meet the engineers or experts of the two companies and to make a new examination of the locality and report again upon the whole subject. The engineer made a further examination and reported that the place of the proposed crossing was one of the most dangerous points on the Canada Southern Ry. for a crossing at rail level, and that, as such, he was unable to recommend it for the approval of the Board, but suggested that, on account of the difficulty of drainage, an overhead crossing might be authorized.

In view of the engineering difficulties, and because it appeared to the Board that the applicant company had not been satisfactorily prepared with evidence upon this part of the case, the Board granted a hearing of the application to rescind or vary its order, and again visited the town of Essex for the purpose, accompanied by its chief engineer. At the hearing the applicant company offered evidence for the purpose of shewing that, on account of the difficulties of drainage, a subway crossing in that locality was not practicable, and produced two independent railway engineers of high standing whose opinions were strongly against the proposed subway and in support of a level crossing at the point proposed by the applicant company.

The chief engineer of the Board has made a report upon the application in which he expressed the opinion "that a subway in the country surrounding Essex is, while feasible, to a great extent impracticable"; that "it would be very difficult to keep the water out of it during the spring freshet, particularly at a depth of fifteen feet,

to which it would have to go taking the rail level of the Canada Southern as it is now," and that "it could only be done at a tremendous cost and probable stoppage in operation." The Chief engineer reported against the proposed overhead crossing, and that "with the present facilities for level crossings where, in such places as this, it is almost impossible to give anything else, they are, in my opinion, quite safe"; and the engineer recommended that the application for a level crossing, as requested, be granted. The Board has discussed the matter fully with the chief engineer.

The majority of the Board are still of opinion that the level crossing asked for would be a very dangerous one, and it is with great reluctance that they accept the views and recommendations of the chief engineer. They feel, however, that the questions involved are engineering questions, and that the construction of a subway in the neighbourhood of the town of Essex would, in view of the opinions expressed by the chief engineer of the Board as well as by other engineers, involve the applicant company in very great expense and risk of heavy loss, and that a subway would probably prove very difficult and expensive to maintain. They agree with the chief engineer in thinking that an overhead crossing would not be reasonable, and they accept the chief engineer's recommendation in favour of the level crossing upon his assurance that, with the precautions which he recommends, it can be made safe.

The Board has recently adopted a general regulation authorizing passenger trains to cross at a speed of thirty-five miles per hour, and freight trains at a speed of twenty miles per hour, over level crossings where satisfactory interlocking and other safety appliances are installed, in consequence of which less delay will be involved to the trains of the Michigan Central Ry. Co. than would be the case under the previous restrictions.

A large number of petitions and considerable evidence of neighbouring residents were offered in support of the application for the level crossing; but, in view of the danger which the majority of the Board feel will exist at the crossing, they would not attach

any great weight to representations and evidence of this kind. They feel that they must accept and act upon the expert evidence offered, and particularly the opinions of the Board's chief engineer.

By statute passed at the last session of the Parliament of Canada, 6 Edw. VII. ch. 184, the railway and works of the Windsor, Essex and Lake Shore Ry. Co. were declared to be works for the general advantage of Canada.

It has now been argued by the Michigan Central Ry. Co. that, before the applicant company can be authorized to carry its tracks across the line of the Canada Southern Ry., it must have its route and its location plans approved in manner required by the Dominion Railway Acts.

It does not appear to the Board that this is necessary. Apparently the Provincial Act did not require approval of the route or location of the railway by any authority. As the Board held before, the requirement in the Electric Railway Act of Ontario that plans be filed with the Provincial Minister of Public Works was a condition only to the exercise of the right to expropriate land and not a condition precedent to the right to construct or operate the railway. The company's Act of incorporation, 1 Edw. VII. ch. 92 (Ont.), provided that the railway might be carried along and upon such public highways as might be authorized by the by-laws of the respective corporations having jurisdiction over the same. It is not disputed that the necessary authority to run along the highways has been given by municipal by-laws. The original Act, as well as the Ontario Act of 1905, ch. 110, authorized the railway company to carry its line across the line of any other company on the level. Before the passing of the Dominion Act declaring the company's railway to be a work for the general advantage of Canada, the Board heard the application for a level crossing, and made an order authorizing the line to be carried underneath the Canada Southern Ry. The last mentioned Act provided that the Railway Act, 1903, and amendments thereto, with a certain exception, were to apply to the company and to its works, to the exclusion of the Electric Railway Act of Ontario or any provision

of the Act incorporating the company or any amending Act inconsistent therewith; but provided that nothing therein contained should affect any action theretofore taken pursuant to the powers in such Acts. The application with which the Board has now to deal is one for a variation of the former order, so as to allow of the crossing being made at grade. The Board is of opinion that such an order may be made without approval of the route or the location of the railway under the Railway Act, 1903.

BRANCH LINES

CANADA.]

[BOARD OF RAILWAY COMMISSIONERS.

BERTRAM & SONS V. THE HAMILTON AND DUNDAS STREET
RY. CO.*Branch Line—Provincial Railway—Authority of the Board—Railway Act, 1903,
sec. 7.*

Bertram & Sons applied to the Board for an order directing the Hamilton and Dundas Street Ry. Co. (incorporated by the Legislature of the Province of Ontario) to construct and maintain a siding from their railway to the premises of the applicants.

Held, that the application must be refused, as the Board had no jurisdiction over a provincial railway, and no power to make an order for the construction of a siding by it.

THIS was an application by John Bertram & Sons, Limited, of Dundas, Ontario, for an order directing the Hamilton and Dundas Street Ry. Co. and the Toronto, Hamilton and Buffalo Ry. Co., or one of them, to construct and maintain a branch line from the railway of the Hamilton and Dundas Street Ry. Co. from Hatt street, in the town of Dundas, to the lands and premises of the applicants.

The Hamilton and Dundas Street Ry. Co. was incorporated by Act of the Legislature of the Province of Ontario, and its railway was never declared by the Parliament of Canada a work for the general advantage of Canada.

The contention on behalf of the applicants was that sec. 7 of the Railway Act, 1903, gave the Board jurisdiction.

This section provided that "every railway, steam or electric street railway or tramway, the construction or operation of which is authorized by a special Act passed by the Legislature of any Province, now or hereafter connecting with or crossing a railway which, at the time of such connection or crossing, is subject to the legislative authority of the Parliament of Canada, is hereby declared to be a work for the general advantage of Canada in respect only to such connection or crossing or to through traffic thereon," etc.

The Toronto, Hamilton and Buffalo Ry. Co. is subject to the legislative authority of the Parliament of Canada.

The application was heard at Toronto, on 11th December, 1905.

A. C. Thompson appeared for the Bertram Company;

G. H. Levy appeared for the Hamilton and Dundas Street Ry. Co.; and

H. Carscallen, K.C., and *E. D. Cahill* appeared for the Toronto, Hamilton and Buffalo Ry. Co., between whose line and the street railway there was a connection.

Dec. 11, 1905. THE CHIEF COMMISSIONER:—These provincial railways are declared to be works for the general advantage of Canada in respect only of the making of the physical connection, the crossing of one by the other, and the through traffic between them. That does not include the making of sidings or the giving of facilities for traffic.

Its purpose is to make those railways authorized by the provincial legislatures subject to the Dominion Railway Act in respect of certain matters only, and not to make the whole of these railways, after they have once been connected, and become in one sense a connection of a Dominion railway, wholly subject to the Act for all purposes.

We hold, that the Hamilton and Dundas Street Ry. Co. is not within our jurisdiction, and that the Board had no power to make an order directing it to give a siding.

NOTE.

See *Patriarche v. Grand Trunk Ry. Co.*, and *Hamilton Radial etc., Ry. Co.*, 5 Can. Ry. Cas. 200.

POWER WIRE CROSSINGS.

CANADA.]

[BOARD OF RAILWAY COMMISSIONERS.]

CANADIAN PACIFIC AND CANADIAN NORTHERN RY. COMPANIES
v. KAMINISTIKUIA POWER COMPANY.*Power Company—Wire Crossings—Railway Lands—Public Highways—Terms and Conditions—Indemnity—Secs. 25, 47 and 194 Railway Act, 1903.*

A power company applied under sec. 194 of the Railway Act, 1903, to place wires for the transmission of electric power of high voltage across the lands of a railway company.

Held, that the power company should indemnify the railway company from all loss or injury arising from the placing of such wires across its right of way or the transmission of electric power thereon, except where the loss was directly attributable to the negligence of the railway company, its agents or employees.

Upon it subsequently appearing, however, that the transmission lines were constructed along highways under provincial authority in respect of which highways the railway company had merely the right of crossing,

Held, that the power company stands in the position of a telephone company, as in *National Telephone Company v. Baker* (1893), 2 Ch. 186 and the tramway company referred to in *Eastern and South African Telegraph Co. v. Capetown Tramway Companies* (1902), A.C. 381.

Held, also, that the power company should be required to be responsible only for injuries arising from the negligence of itself or its servants or agents, and in respect thereof the railway company needs no protection by an order of the Board.

The following statement of the facts in this case is taken from the judgment of the Chief Commissioner:

By an order of the Board, of the 7th August last, the Kaministiquia Power Company was granted leave to erect, place and maintain power transmission lines, having a maximum voltage between wire and earth of fifteen thousand volts, across the tracks of the Canadian Pacific and the Canadian Northern Railway Companies' right of way at West Fort William as shewn on a certain plan and in accordance with certain specified drawing and subject to the conditions set forth in the order, among which were the following;

"1. That the applicant company, at all times, at its own ex-

pense, maintain, in good order and condition, the wires crossing the said railways so that at no time shall any damage be caused to the companies owning, operating, or using the said railways, or to any person lawfully upon or using the same."

"2. That the applicant company, at all times, wholly indemnify the companies owning, operating or using the said railways of, from and against all loss, costs, damage and expense to which the said railway companies may be put by reason of any damage or injury to person or property caused by any of the said wires or any works or appliances herein provided for not being erected in all respects in compliance with the terms and provisions of this order, or if, when so erected, not being at all times maintained and kept in good order and condition, and in accordance with the terms and provisions of this order, as well as any damage or injury resulting from the imprudence, neglect, or want of skill of any of the employees or agents of the applicant company."

"3. That no work, at any time, be done under the authority of this order in such a manner as to obstruct, delay, or in any way interfere with the operation or safety of the trains or traffic on the said railways."

The order was signed and issued without previous communication to the parties of a draft thereof.

On the 25th of August the Board received from the Canadian Pacific Company an application, dated 22nd August, 1906, in the terms following:

"The Canadian Pacific Railway Company hereby applies under section 25 of the Railway Act, 1903, for an order varying or amending the order of the Board made on the application of the Kaministiquia Power Company, Limited, under section 194 of the Railway Act, 1903, for leave to erect, place and maintain power transmission lines having a maximum voltage between wire and earth of 15,000 volts across the tracks of the present applicants, and the Canadian Northern Railway at West Fort William, as shewn on the

plans and in accordance with drawings on file with the Board, said order being dated 7th day of August, 1906, so as to provide that the erection, construction and maintenance of the said wires shall be wholly at the risk of the Kaministiquia Power Company, and that the said company shall indemnify and save harmless the present applicant of and from and against all loss, cost, damage and expense from any cause whatsoever to which the applicant company may be put by reason of any damage or injury to personal property or otherwise resulting from the erection, construction, operation or maintenance of the said wires or any working appliances which may be provided in connection therewith.

“The applicants say, in support of the said application, that the construction, operation and maintenance of high potential wires across its right of way is a source of gravest danger to the applicant company, its property and to the property and persons of those using the railway; that the presence of the said wires, even though properly protected so far as human foresight can provide, nevertheless means that, in case of an accident, whether due to exceptional causes or not, the resultant damage to the applicant company's property and that of the third persons as above mentioned will be very far reaching, and is not a risk which should under the circumstances be assumed by the applicant company.

“The applicants feel that they should be insured against any such loss and request that clause 2 of the order in question be amended in accordance with this application.”

Notice of this application having been given to the Canadian Northern Railway Company, that company notified the Board that it concurred therein, and requested that the order, as affecting it, might be altered as desired by the Canadian Pacific Railway Company.

The Kaministiquia Power Company also applied to the Board for leave to cross the line of the Canadian Pacific Railway Company, at another point, with 2,400 volt power lines according to certain plans, and a draft order, in similar terms to that made

upon the previous application, was made out and submitted to the parties, whereupon the Canadian Pacific Railway Company objected to the form, and desired terms similar to those asked for in its application to vary the first order.

By agreement between the parties, written arguments were submitted upon the question thus raised.

E. W. Beatty, for the Canadian Pacific Ry. Co., in support of the application. Damage may result to the property of the railway companies, not due to the failure of the power company to maintain the wires in accordance with the order of the Board, or to the negligence of their servants, such as lightning or hurricane, over which the power company have no control.

In the case of high potential wires the risk of accident must be great. The Board has power under secs. 194 and 47 of the Railway Act, 1903, to determine terms and conditions upon which these wires should be erected and maintained. The railway companies should be given an absolute indemnity against everything but the negligence of their own servants or agents. I refer to *Fletcher v. Rylands*, 3 H.L. 330; *National Telephone Co. v. Baker* [1893], 2 Ch. 186; *Eastern and South African Telegraph Co. v. Capetown Tramway Companies* [1902], A.C. 381, per Lord Robertson at pp. 391, 2, 3. In the latter cases the principle laid down in *Fletcher v. Rylands* was sustained and extended to the use of electricity, viz.: "If the owner of land uses it for any purpose which, from its character, may be called extraordinary user, such for example, as the introduction on to the land of something which, in the natural condition of the land, is not upon it, he does so at his peril and is liable, if sensible damage results to his neighbour's land or if the latter's legitimate enjoyment is thereby materially curtailed."

The case of one railway company crossing another is not analagous. In that case the trains of either crossing company are always, or should be always, under control. The element of accident due to providential causes and not to any act or default

of the employees of either company can scarcely enter into the question of operation of a railway crossing, but it may in this case.

Geo. H. Montgomery, for the Kaministiquia Power Co. This application should not be entertained and more onerous conditions imposed after the order has been issued and the works constructed; the railway companies are already sufficiently protected by the terms of the order. There is no precedent for a company taking property from a private proprietor in the public interest being required to insure the proprietor against all loss, whether caused by its own fault or by fortuitous events. Railway companies, in taking lands for the operation of their railways, create a new source of danger to adjoining proprietors, but it has never been contended that they are liable as insurers whether guilty of negligence or not: see *Canadian Pacific Ry. Co. v. Roy* [1902], A.C. 220, 1 Can. Ry. Cas. 170, 196. The power company is authorized by its charter to construct and maintain lines for the transmission of power and is not subject to any responsibility other than that for which it would be liable in law in any event.

November 17, 1906. THE CHIEF COMMISSIONER:—So far as I am aware, the question is a new one which has never previously been raised upon any application before the Board. In a number of applications made by the Toronto and Niagara Power Company and the Ontario Power Company, orders were at first made authorizing the carrying of the lines over the railway tracks for construction purposes only, without the right to transmit power. The question as to the nature of the protection proper to be provided at such crossings, is by no means an easy one. On different occasions considerable expert evidence has been offered to the Board upon the point. In some cases, by consent of the railway companies, leave has been given to transmit power over the wires pending the final determination of the methods of protection to be adopted in each case, and, in these instances; the orders have, with the concurrence of the power company,

specifically cast upon that company all risk of injury and all responsibility for any damages that might be occasioned by the stringing of its wires and the transmission of power along the same, to the railway company or any power or telegraph company, authorized to occupy or operate along the right of way of the railway company, or for which the railway company or other companies, might be held liable; and required the power company to indemnify the railway company and such telegraph or power companies, and each of them, of and from all liability for loss, costs and damages arising out of any injury done by the power company, its wires or works.

Subsequently the Ontario Power Company entered into express agreements with some of the railway companies affected respecting a number of such crossings and the protection to be provided thereat, and these agreements have been approved by the Board, and orders issued accordingly. Among the provisions of such agreements are the following:

"And the power company covenants and agrees that it will indemnify its agents, operatives and employees, of and from any and all, and save harmless the party of the first part from, claims of every name, nature and description which shall be made against the railroad company or against such operatives or employees by reason of any injury which shall come to any of them or to the public or to any property in transit upon such railroad because of the operation of its transmission lines or any thereof under this grant and licence, and whether such injury shall be sustained through the derailment of any locomotive or car of the railroad company or otherwise, it being intended that all the risk of all accidents incident or arising from the construction, maintenance or operation of such cables over the railroad of the railroad company, however occurring, shall be borne by the power company. The railroad company is to notify the power company in writing of any such claims or of any suit for the recovery of such damages, and the power company may with the support of the rail-

road company arrange with the claimant or defend such suits."

"All the work to be done by the power company or by its contractors, agents or servants, in connection with the doing of the said work, or in connection with the repairs, renewal or maintenance thereof, shall be done at the risk of the power company, without expense to the railroad company.

The power company covenants and agrees to keep, abide and perform all the terms and provisions hereof, and shall and will perform all the terms and provisions hereof, and shall and will at all times indemnify and save harmless the railroad company of and from all loss and damage which may happen or arise or be done, incurred or caused by reason of the construction, repair, renewal, maintenance or use of the said work."

"The railroad company shall not in any case be liable to the power company or to its contractors, agents or servants, or to the agents or servants of any such contractors, for any injury or damage to the person or property of the power company or to the person or property of any of its contractors, agents or servants, or to the agents or servants of any such contractors, which may happen or be done or be caused by, or by reason of the doing of, said work, or during the repair, renewal, maintenance or use thereof; and the power company shall and will assume, and does hereby assume all the responsibility and liability for any and all such injuries or damages, whether caused by the negligence of the railroad company, its agents or servants or otherwise; and the power company shall and will indemnify and save harmless the railroad company, its successors and assigns, of and from all damages, claims for damages, demands, suits, recoveries, judgments or executions, which may arise, or be made, had, brought or recovered, by reason of or on account of any such injuries or damages. And it also covenants and agrees to indemnify and save harmless the railroad company, its agents, servants and passengers, of and from all loss, injury or damage to it or to its agents, servants or passengers, which may happen or be done or caused by, or by reason of the doing of, said work, or by

or by reason of the repair, renewal, maintenance or use thereof, or by or by reason of the failure to repair, renew, or maintain the said work."

The form of the order made on the 7th August was taken from the form generally used by the Board in authorizing the carrying of telephone wires across the railway tracks. It is not usual in the case of any of these wire crossings to require compensation to be paid to the railway companies. The order of the 7th August made no provision for any such compensation.

The contention of the Canadian Pacific Railway Company is that the lines of the Kaministiquia Power Company are carried across land owned by the railway company; that no compensation is being given to it for this interference with its right of property; that the wires are to be used for the transmission of something from which there is great risk of injury; and that the railway company should not be compelled to bear any of the risk thus occasioned, whether it arises from the default of the power company or from any source beyond the control of the power company.

In its original terms, the application of the Canadian Pacific Railway Company for a variation of the order asked that the risk be thrown absolutely upon the power company, without providing for cases in which the injury might be due to the default or negligence of the railway company or its agents; but in the written arguments now submitted to the Board the railway company does not go so far, but it suggests a clause which excepts from the liability proposed to be thrown upon the power company "any loss or damage directly attributable to any act, default or negligence on the part of the railway company, its agents or employees."

It appears to me that the contentions of the Canadian Pacific Railway Company are well founded, and that it ought to be at no risk or loss arising from the placing of such wires across its right of way or the transmission of electric power thereon, except in cases in which the loss is primarily due to its default or

that of those for whom it is responsible. Telephone wires over railway tracks cause a measure of physical obstruction, from which there is some possibility of danger. Contact between such wires and other wires may result in injury; but there is no such danger ordinarily attending their existence over railway tracks as in case of wires transmitting high electric power. Usually, too, telephone wires are carried along highways and across railway tracks where the company does not own the land but has merely a right of crossing the highways; and it is not necessary, at present, for the Board to determine what order shall be made where power wires cross a railway upon a highway.

It appears to me that the clause now suggested by the Canadian Pacific Railway Company as a substitute for clause 2 of the original order and of the draft of the order proposed to be made in respect of the power company's second application, is a reasonable one and should be adopted. That clause is as follows:

"That the applicant company, at all times, wholly indemnify the railway company of, from, and against all loss, cost, damage or injury to person or property or business caused by any of the said wires, lines or any work or appliances herein provided for, or to the continuance or use thereof, whether caused by the same or any of them not being erected in all respects in compliance with the terms and provisions of this order, or if, when so erected, not being at all times maintained and kept in good order and condition and in accordance with the terms and provisions of this order, or otherwise howsoever caused, and as well as any damage or injury resulting from the imprudence, neglect or want of skill of any of the employees or agents of the applicant company; Provided, however, that the applicant company shall not be required to indemnify the railway company from and against any loss or damage directly attributable to any act, default or negligence on the part of the railway company, its agents or employees."

The power company now alleges that it has constructed its

works under the order of the 7th August, and that that order at least should not now be varied. It appears to me however, that, as the question is a new one, and as it was raised so promptly after the railway company had received notice of the order made, the power company's objection should not prevail.

January 24, 1907. Upon the statements made in Mr. Montgomery's further communication of the 11th of December, 1906, it appears that the Kaministiquia Power Company has power to construct lines for the transmission of electricity upon and along highways. I understand that this is not disputed by the railway companies, although opportunity has been given for the purpose. This being the case, I think that the power company stands in the position of the telephone company, acting under the provisional order of the Board of Trade, referred to in *National Telephone Company v. Baker* [1893], Ch. 186; and the tramway company, whose lines were constructed under statutory authority, referred to in *Eastern & South African Telegraph Co. v. Capetown Tramway Companies* [1902], A.C. 381.

The lines authorized by the Board's order of 7th August, 1906, are not constructed across the land of railway companies, but along highways in respect of which the railway companies have merely rights of crossing. Under those circumstances, it does not appear to me that the power company should be responsible for any injury except such as may arise from its negligence or that of its servants or agents, and, in respect of such, the railway companies need no protection by order of the Board.

I am, therefore, of opinion that we should not vary the original order in this case.

February 4, 1907. The Kaministiquia Power Company was incorporated by the Legislature of the Province of Ontario, from which it derives any authority that it may have to construct lines along the highways. With its action in this respect this Board has nothing to do. The Board is not asked to give the company any authority to carry its lines along the highways; but as it is doing, and has done, so in accordance with the right

which it claims, and as these rights are not contested by the railway companies interested, we may assume, for the purposes of the applications before us, that the power company's action is lawful.

As the Board has no authority to give or refuse leave to run along the highways, it does not appear to me that it should impose any condition to that being done. The company applied for leave to carry its wires across the tracks of the Canadian Pacific and Canadian Northern Railway Companies; and an order was made authorizing it to do so. The railway companies have since asked for the insertion of a condition throwing upon the power company the responsibility for any damage that may occur to the railway companies or those using the railways. For the grounds expressed in my memorandum of the 24th of January, I do not think that such a condition should be imposed as between the railway companies and the power company, and I think it best that we should simply refuse the applications of the railway companies, leaving the municipality and the public using the highways to such protection as is given by the provincial law.

TRESPASS—CONTINUING DAMAGE.

NEW BRUNSWICK.]

[SUPREME COURT.

CLAIR V. TEMISCOUATA R.W. COMPANY.

(1 *East. L.R.* 524).

Railway—Taking possession of land—Possessory title of occupant—Continuing trespass—Limitation of actions—Railway Act, 1903, sec. 242:

The plaintiff and his predecessors in title were in possession as trespassers of certain land since 1871; the defendants entered upon a portion of it in 1890 and constructed their railway upon it and continued in undisturbed possession of such portion until 1904 and no claim was made for the land so taken though the defendants were willing to pay compensation to any one who could prove that he was entitled to it.

In the year 1905 the plaintiff brought this action of trespass. The defendants pleaded (1) that he was not the owner of the lands; (2) that his claim, if any, was barred by the Statute of Limitations:—

Held (Tuck, C.J. and McLeod, J., dissenting) that though the plaintiff or his predecessor in title was originally a trespasser, yet having been in peaceable possession at the time of the defendants' entry on the lands, he was entitled to damages for being disturbed in his possession.

2. That such passing over the land was a new trespass and therefore the defendants would be liable for all except for so much as was barred under their plea of the statute of limitations which only voids a remedy and does not change the nature of the Act.

MOTION by defendants in an action of trespass to land tried before LANDRY, J., and a jury, to set aside a verdict for the plaintiff for \$60, and to enter a verdict for defendants or for a nonsuit or for a new trial; argued before TUCK, C.J., HANINGTON, LANDRY, McLEOD and GREGORY, JJ., in Easter Term, 1906.

F. LaForest, for plaintiff.

J. M. Stevens, K.C., for defendants.

June 15, 1906. LANDRY, J.:—In about 1871, Peter Clair, the plaintiff's father, lived on a piece of land and occupied it, without title, until about 1879. The plaintiff lived with him. Then Peter Clair and his family, including the plaintiff, moved away from this piece of land. The evidence is that the land in question was owned by one Cunliffe, who owed Peter Clair and gave the land to Peter Clair in satisfaction of this debt. Peter Clair then rented a farm he had in the vicinity of the land in question to one Dan. Chisholm, and in connection with that rental told Chis-

holm he might occupy the land in question till he, Peter Clair, would want it. From 1879, or thereabouts, to 1888, this land was occupied by Dan. Chisholm or some one under him. In 1888 the plaintiff took possession of it, being told by his father to do so, for himself, by virtue of his father's possession and of such ownership as he, the father, had acquired by the circumstances recited above. Then from 1888 the plaintiff pastured and farmed this land for two years, when the defendants, undisturbed, put their railway through it. During some fifteen years after the railway took charge of the locus, the plaintiff occupied the balance of the land, and then in 1904 sold this balance by deed to the government. From 1890 to 1904 the plaintiff neither by word nor by act objected to the railway company's occupation of the locus, and in no way attempted to hold or retain possession of the railway track over the land.

Such is about the case as proven by the plaintiff. The defendants' answer is virtually: We took possession of the land, laid our track in 1890, and used it ever since without any knowledge as to who was the owner; and no one ever laid claim to it before 1904. We are now prepared, and were from the beginning prepared, to pay for the land to the rightful owner, or to the party entitled thereto.

The question to decide therefore is, taking the case as made out by the plaintiff, and applying the law thereto, is he entitled to recover? I believe that the Court must assume that the plaintiff's version of the case as to the facts is the correct one, as the jury so found. The defendants did contradict the plaintiff's evidence in several very important points; and on the trial I was disposed to favour, on the questions of fact, the defendants' version of the affairs, especially as to the plaintiff's not being in possession either by himself or by his father from 1879 to about 1888, and that such occupation as he had in 1888 and 1890 when the railway was built, was more in the nature of a trespasser on land for the time abandoned by its owner. But the jury found otherwise, and I think I am bound by that finding. The jury found the plaintiff in possession in 1890, therefore he had a right to recover against a wrongdoer, and the defendant

company was certainly then a wrongdoer, and so admits itself to be. From 1890 to 1904 the plaintiff assumed and held such possession of the balance of the land without interference from any one so as to enable him to deed it to the government without a word of dissent from anybody. If then the railway company were trespassing in 1890, their acts have since continued to be acts of trespass for which they are responsible, beyond that which is barred by the Statute of Limitations, to some one, and that some one is he who was in possession. The defendants being all along willing to pay, and recognizing at the same time their want of right to hold the land, there was no disseisin; the plaintiff being in possession in 1890 never was ousted of that possession. As evidence of that fact the defendants, a short time before the action was brought, told the plaintiff, in effect, that they recognized that some one was entitled to be settled with and paid for the land; and that if he could establish his claim to it they would pay him. That fact demonstrates that while occupying the land as a matter of necessity for the purposes of their road, the defendants did not do so as owners, but by toleration of the owners. They admit that they were waiting for a rightful claimant to account with him. The jury found that the plaintiff was in possession when the defendants first went on, and no one has in the meantime established a claim against that possession. There appears to me to be a wide distinction between this case and *Chaudiere Machine and Foundry Co. v. Canada Atlantic R.W. Co.*, 33 S.C.R. 11. Here the defendants had no right to build on this land and acquired no right to keep going on it, and what damage they did each day was the direct result of a trespass and a continuing trespass. There the defendant had a right to build, and if damage was done to the plaintiffs, it was a damage resulting from the construction of an embankment, and a raising of the level of the street, which obstructed their egress and ingress and flooded their premises. The construction of the embankment and the raising of the street were no trespass in themselves, but the damages claimed were collateral effects of such construction and levelling. Hence one action by the original

owner of the premises afterwards sold to the plaintiffs, which premises suffered damage by flooding, etc., might have entitled the owner to recover for future inconvenience and damage. The right of action by the original owner, if he ever had any, in which he could have recovered once for all, had become barred by lapse of time. The continuation of the inconvenience for the suffering of which the original owner might have recovered damages originally, did not create or renew to the new owner a right of action which, by lapse of time, had ceased to exist. In this case, if the plaintiff had had a legal right to bring an action at once for the first act of trespass, he could not have recovered damages for trespasses possibly to be committed ten or fifteen years afterwards.

For the reasons, I believe the verdict should stand.

HANINGTON, J.:—I agree with the judgment of Judge Landry, and think a new trial should not be ordered in this case.

I have some doubts as to whether or not the long-continued possession of the defendants would be of the nature of disseisin, and therefore the action of trespass would not lie, because the plaintiff was not in possession; but taking the defendants' evidence, it is clear they did not intend to oust the owner, but only to use the land for the purposes of the railway, and I am inclined to think in the continuing of a trespass, that each act becomes a new trespass, in a sense, and especially in the sense shewn in the evidence here.

Three of the pleas are that they did not go on the land at all, that the land did not belong to the plaintiff, and the Statute of Limitations.

It was clearly open to the jury to find that the land as against a wrongdoer did belong to the plaintiff, and he was in possession, and our Courts hold that prior possession is perfectly good against a wrongdoer, and therefore the plaintiff's possession here was prior to theirs. The jury so found; and the plea of possession was against the defendants. They deny the title to the land, and jury found against them as I have said. Prior possession is held to be good as against a wrongdoer, and will

avail against him in an action of trespass or ejectment, and taking it therefore as the case stands, I think that the evidence warranted the finding of the jury, that upon the findings of the jury the issues are all for the plaintiff, and the action of trespass would lie for all the acts, and did lie for all the acts of trespass. Each passing over the land was a new trespass, and therefore they would be liable for all, except for so much as was barred under their plea of the Statute of Limitations, which only voids a remedy and does not change the nature of the act. I agree with the conclusion of my brother Landry that a new trial should be refused.

GREGORY, J.:—I concur in the conclusion of my brothers Hanington and Landry. I think the case is distinguished from the *Chaudiere Machine and Foundry Company v. Canada Atlantic R.W. Co.*, 33 S.C.R. 11, and this case is not governed by that for the reason that there was the one act of the defendant in that case. They built the railway over a street and raised the embankment, and it was consequent upon the doing of that act that the water collected as it came down and flowed on the plaintiffs' land. The plaintiffs had no ownership of the land where the embankment was; it was public property; it was no continuing act against the plaintiffs, but one act, the building of the dam, and therefore the damages could be assessed on one finding, and there would be no new action, but here from day to day there was a fresh act of the defendant railway company as against the plaintiff in crossing over with their locomotives and cars the plaintiff's land, and therefore the cases are not the same, and I should not think that the case of the Supreme Court of Canada controlled this. If I could see the similarity I would bow at once to the authority of the Supreme Court.

TUCK, C.J. (after stating the facts):—It seems to me that the company took possession of this land as if nobody owned it, and certainly not the plaintiff. This view is strengthened by the fact that no one made any claim until John Clair did in 1904. It looks to me as if the plaintiff never thought he had any claim

for trespass on his land until some one advised him to that effect in 1904, and the evidence is made to suit the circumstances.

It occurs to me, from all the facts, that the company built their railway, put up their fences, and went through this land, with a complete right, as if there was no owner, by grant or otherwise. At all events, never supposing for a moment that John Clair had any right.

As to the occupancy by Chisholm, John Clair says that Chisholm went on the land by leave of his father, and held it for his father. There is evidence that Chisholm paid rent to Cunliffe and was holding the property as a tenant of Cunliffe, and that he was there until 1894. John Clair says that Chisholm held the property because his father, Peter Clair, told him to do so. So if this evidence about Chisholm is true, then the plaintiff was not in possession in 1894; for if Chisholm was there in 1894, it was at the most Peter Clair's possession and not the plaintiff's; and he was not in possession when the railway was constructed in 1890. The whole evidence leads me to the conclusion that the plaintiff was never in possession of this land, as an adverse one, at the time the railway was built in 1890.

In my opinion, the answers of the jury to the substantial questions in this case are such as reasonable men ought not to have found, for I think that in 1890 the plaintiff was not in possession of this land, and never held it adversely against all others who might have claims.

I think that there is no sufficient proof that the defendants ousted the plaintiff of his possession, or that the plaintiff was in possession, or had any title to the land, when the defendant company entered upon it. I think that in 1890, when the railway was being built, the plaintiff had no title to this land by possession or otherwise. And if there is no contradictory evidence, it seems plain to me that the plaintiff, by making claim for damages against the railway company from 1890 to 1904, shews that he himself felt he had no claim.

I fail to see that the plaintiff has shewn title by uninterrupted, adverse possession. Unless he can do so, he is barred by

the Statute of Limitations, for his father left the property in 1878, and when the railway entered upon the property apparently there was no one in possession. I think the evidence shews that the plaintiff himself thought that he never had actual possession of this land.

Besides, even if the plaintiff had possession in 1890, he had not had it for twenty years, but by adding fifteen years since that time when he was not in possession, he makes it up to thirty-five years.

It seems to me that the plaintiff cannot wait for fifteen years, and then successfully seek to recover. He must not in this way sleep on his rights.

I see no reason for a new trial on the ground of the improper admission of evidence, or of non-direction of the learned Judge. As to the latter, he was not asked to direct as the learned counsel for the defendant argues he should have done.

(Reference to *Ex parte Winder*, 6 Ch. D. 696; *Littledale v. Liverpool College*, [1900] 1 Ch. 19; *Parkdale v. West*, 12 App. Cas. 602; *North Shore R.W. Co. v. Pion*, 14 App. Cas. 612; *Stewart v. Ottawa and New York R.W. Co.*, 30 O.R. 599.)

The Railway Act, 3 Edw. VII. ch. 58, by sec. 242 provides that "all actions or suits for indemnity for any damages or injury sustained by reason of the construction or operation of the railway shall be commenced within one year next after the time when such supposed damage is sustained, or if there is continuation of damage within one year next after the doing or committing of such damage ceases, and not afterwards." Of course, the plaintiff claims that the damage continued down to the time he remained owner, and when, as such owner, in 1905, he brought this action. I differ from that view for reasons already stated.

Several of the cases cited by the defendants' counsel were decided before railways began to be built, and therefore, before any Acts of Parliament had been passed as to payment of compensation for lands expropriated. Take, for instance, *Attorney-General v. Balliol College*, 9 Mod. 407; *East India Company v. Vincent*, 2 Atk. 82; and *Kenny v. Brown*, 3 Ridg. 518.

In *Patterson v. Great Western R.W. Co.*, 8 U.C.C.P. 89, the Court held, under the circumstances of that case, that "the damage was not continuing and that the action should have been brought within six months."

The real points in this case are, was John Clair, the plaintiff, the occupier of this land, as the actual owner, when the defendant company began the construction, and was he so in the year 1905 when this action was brought? I think he was not at either time, and if I am right in that belief he cannot succeed. It appears that Cunliffe had been in possession down to 1871, that then for a debt he transferred whatever possession he had to Peter Clair, the plaintiff's father, who continued to have some kind of possession until 1878. From that time down to 1888, when it is said he gave possession to the plaintiff, the land was occupied by Chisholm. In 1890, when the defendant company commenced to construct the railway, it found nobody in possession. No one put in any claim for payment of compensation, and it was not until 1905, fifteen years later, that the plaintiff commenced this action for damages.

I think that he has failed in his proof and should be nonsuited, and that a rule should be entered accordingly.

MCLEOD, J.:—This is an action for trespass brought by John Clair against the Temiscouata Railway Company. To the action the defendants plead several pleas, among them the Statute of Limitations.

The facts of the case were practically that John Clair claimed to be in possession of a piece of land in the county of Madawaska, over which the defendants' railway runs. He was in possession himself, he claims, in 1888; and he claims his father and some other parties had been in possession from 1871, and that their possession would enure to his benefit.

There may be some question about that. The jury found, however, he was in possession from then, and that as a matter of fact he was in 1888 in possession himself. I think the evidence of that was slight, but the jury so found and the learned Judge who tried the case is satisfied with that finding, or submits to it.

The defendants in 1890 built their railway across the plaintiff's land, and have been using it ever since, and running their trains across it. It appears the plaintiff, although he was there at the time, made no objection to their taking possession of the land in 1890, and they have been using it and running their trains across it from that time down to the present time.

This action was brought in 1905. I have come to the conclusion that the plaintiff cannot succeed in an action of trespass. The trespass was committed when the defendants took possession of the land for the purpose of their railway, which was in 1890, and that trespass is completed. He had a right within any time within the period allowed by the Statute of Limitations to bring his action and recover the full amount for trespass. I think that having taken possession of the land, the running of their trains from that time down is not trespass for which an action will lie; it is not a continuing trespass.

Damages appear to be assessed from the 15th of August down to the trial at the rate of \$10 per year for six years prior to the commencement of the action.

I refer to a case which seems to me to cover this case: *Chaudiere Machine and Foundry Co. v. Canada Atlantic R.W. Co.*, 33 S.C.R. 11.

Here the trespass was committed when the railway went on the land and took possession and built their railway. That was the trespass, and at that time the plaintiff could have brought his action and recovered full damages for all the land taken; and keeping it and continuing to go on and run the railway is not an actionable trespass, because it is no trespass against the possession of an owner.

In 1905 when the action was brought, the defendants had been in possession of the land and running the trains over it and using it. In the case cited, as in the present case, the work was completed and used, causing a damage to the plaintiff each year, and it was held that he could not recover as for a continuing trespass. If he has a title he might be entitled to bring an action of ejectment and eject them from the land. I think a judgment for nonsuit should be entered, because if a verdict for

the defendants is entered it might affect the plaintiff in recovering the possession of his land by ejectment, if he is entitled to it. I think the action for trespass will not lie.

NOTE.

The plaintiff's right to recover in this case illustrates the old learning at one time so much insisted on but now less frequently seen in our reports, that as against all subsequent trespassers the person in possession may recover damages for any injury to his possession although as against the true owner he is himself but a trespasser. The law is laid down in Gilbert's Law on Tenures, p. 21, as follows: "When any man is disseised, the disseisor has only the naked possession because the disseisee may enter and evict him; but against all other persons the disseisor has a right and in this respect only can be said to have the right of possession, for in respect to the disseisee he has no right at all. But when a descent is cast the heir of the disseisor has *jus possessionis* because the disseisee cannot enter upon his possession and evict him but is put to his real action because the freehold is cast upon him."

The law as to "descent cast" set out in the latter part of this quotation has now been varied (in Ontario) by R.S.O. ch. 133, sec. 10, but otherwise is no doubt still applicable as illustrated by the case now reported; see also Coke's Inst. 238*a* and Hargrave & Butler's notes thereto and sec. 266*a* and notes.

Continuing damage. The rule that plaintiff may recover for subsequent wrongful entries or trespass was at one time much discussed in *Nicklin v. Williams*, 10 Exch. 259; *Backhouse v. Bonomi*, E.B. & E. 622, 9 H.L. Cas. 503; *Whitehouse v. Fellowes*, 10 C.B.N.S. 765; *Brunsdon v. Humphrey*, 14 Q.B.D. 141, and *Mitchell v. Darley Main Colliery Co.*, 14 Q.B.D. 125, and the rule clearly laid down that though the foundation for a subsequent injury may have been settled for by the payment of damages or may have been laid at a time when it would be barred by the Statute of Limitations yet subsequent wrongful acts causing new injuries occurring after such settlement or at a time when not so barred may give rise to a new cause of action for which damages may be recovered. It is an exception to the general rule that injuries to person or property must be made the subject of one claim only and must be settled for once and for all. The rule was lately discussed by the Supreme Court in the cases of *Chaudiere v. Canada Atlantic R.W. Co.*, 33 S.C.R. 11, and *Montreal Street R.W. Co. v. Boudreau*, 36 S.C.R. 329.

EXPROPRIATION—COMPENSATION.

MANITOBA.]

[MACDONALD, J.]

WICHER v. THE CANADIAN PACIFIC RAILWAY COMPANY.

(16 *Man. L.R.* 343.)

Railway company—Railway Act, 1903, secs. 152, 153, 171—Right of action where land entered upon by railway company before expropriation proceedings begun.

The filing of a plan, profile and book of reference under the Railway Act, 1903, shewing the land required for the railway, does not warrant the company in taking possession of it before proceedings for expropriation are commenced, unless by agreement with the owner; and, if such possession is taken, the company is a trespasser, and the owner is not limited to the remedy by arbitration provided by the Act, but may proceed by an ordinary action at law against the company.

ARGUED: August 9, 1906.

DECIDED: December 19, 1906.

MOTION to dismiss the statement of claim issued herein on the ground that no cause of action was disclosed and that the plaintiff's only remedy was by arbitration.

W. J. Wright (*G. A. Elliott*), for plaintiffs, cited the Railway Act, 1903, sec. 153; *Parkdale v. West*, 12 App. Cas. 606; *North Shore R.W. Co. v. Pion*, 14 App. Cas. 630; *Arthur v. Grand Trunk R.W. Co.*, 25 O.R. 37, 22 A.R. 93; *Re Ruttan and Dreifus and Canadian Northern R.W. Co.*, 12 O.L.R. 187, 5 Can. Ry. Cas. 339; *Hutchinson v. Manchester R.W. Co.*, 15 M. & W. 314; *Sandon Waterworks Co. v. White*, 35 S.C.R. 309; *Chaudiere v. Canada Atlantic R.W. Co.*, 33 S.C.R. 11; *Essery v. Grand Trunk R.W. Co.*, 21 O.R. 224.

H. P. Blackwood for defendants cited *Northern Elevator Co. v. McLennan*, 14 Man. L.R. 147; *Wood v. Charing Cross R.W. Co.*, 33 Beav. 290; *McLaren v. Caldwell*, 5 A.R. 363; *Parkdale*

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v. *West*, 12 App. Cas. 606; *Hanley v. Toronto, Hamilton & Buffalo R.W. Co.*, 11 O.L.R. 91, 5 Can. Ry. Cas. 25; *Bannatyne v. Suburban Transit Co.*, 15 Man. L.R. 22; *Smith v. Public Parks Board*, 15 Man. L.R. 249; *French v. London, etc., R.W. Co.*, 2 T.L.R. 395; *Salaman v. Secretary of State for India*, 75 L.J.K.B. 418.

MACDONALD, J.:—The statement of claim alleges that the plaintiff was the owner of certain lands in the City of Winnipeg and that the defendants, in the month of July, 1903, by their servants, agents and workmen wrongfully and unlawfully entered upon the said lands and, amongst other things, removed, pulled up and destroyed the boundary stakes; and constructed, built and laid down a large portion of their line of railway along, across and upon said lands without any notice to or the permission of the plaintiff.

It is urged on behalf of the defendant company, that they entered upon and took the land in question pursuant to the powers vested in them by the Canadian Railway Act, having first made and deposited, in compliance with the said Act, a plan, profile and book of reference and that, having thus complied with the Act, the only remedy of the plaintiff is that provided for by the Act, namely, arbitration.

The company must, however, do more than prepare and deposit a plan, profile and book of reference; it must take the necessary proceedings to compensate the owner of land so entered upon and taken by it, as provided for by the Act, and failing to do this they are trespassers and the plaintiff is not limited to the remedy provided by the Act.

The motion is dismissed with costs.

Upon the defendant undertaking to proceed within 30 days to settle the compensation due to the plaintiff, under the provisions of the Railway Act, I grant a stay of proceedings of this action.

NOTE.

See *McIsaac v. Inverness*, ante p. 105; and *McIsaac v. Inverness R.W. Co.*, ib. p. 112 and note p. 131.

ARBITRATION—AWARD.

YUKON TERRITORY.]

[MACAULAY, J.]

MORLEY v. KLONDIKE MINES R.W. Co.

(5 West, L.R. 109).

Arbitration and award—Motion to set aside award—Misconduct of arbitrators—Gross undervaluation of mining claim in question—Interested motives alleged against arbitrators—Evidence—Disproof of charges—Railway Act, 1903, secs. 164, 168, s.s. 3—Payment out of Court.

The Court will not interfere to set aside an award unless corruption, partiality, misconduct or irregularity is distinctly proved against the arbitrators, and mere suspicion is not sufficient; or unless the sum awarded is so grossly and scandalously inadequate as to shock one's sense of justice.

The plaintiff having made an application under sub-section 3 of section 168 of the Railway Act, 1903, to set aside the award of the majority of the arbitrators on the ground that it was unjust, improper, unreasonable and grossly and scandalously inadequate and against the weight of evidence, also, that no reasons were given for the amount of the award:—

Held, (1) That there was no evidence which would warrant a finding of corruption, partiality or irregularity on the part of the majority of the arbitrators or that the amount of the award was grossly and scandalously inadequate.

(2) Under section 164 arbitrators are not bound to give reasons for their conclusions though it would be better to do so.

APPLICATION by plaintiffs to set aside an award dated 2nd August, 1906, made by George Coffee and Edward Simpson, a majority of the arbitrators, on the ground that the award is unjust, improper, unreasonable and grossly and scandalously inadequate, and that the same was made without regard to the evidence, and on the ground that the majority of arbitrators acted unfairly, improperly, and not as fair or just arbitrators between the parties on such arbitration, or in making such award.

George Black, for plaintiffs.

C. W. C. Tabor, for defendants.

November 23, 1906. MACAULAY, J.:—The application is made under sub-section 3 of section 168 of the Dominion Railway Act,

the amount awarded having been \$300. Sub-section 3 provides as follows: "The right of appeal hereby given shall not affect the existing law or practice in any province as to setting aside awards."

Chapter 32 of the Consolidated Ordinances of the Yukon Territory is known as the Arbitration Ordinance. Section 12 provides as follows: "Where an arbitrator or umpire has misconducted himself, the Court or a Judge may remove him. (2) Where an arbitrator or umpire has misconducted himself, or an arbitration or award has been improperly procured, the Court may set the award aside."

These are the only grounds, apparently, under the Arbitration Ordinance of this Territory, on which an award may be set aside, and it was argued by counsel for defendants on this motion that in considering this application I was confined to the provisions of section 12, and could consider only such grounds as were therein provided, and not all the grounds as set out in the notice of motion. However, I think I may fairly consider all the grounds set out in the notice of motion, and am of opinion that they are covered by the provisions of section 12 of our Arbitration Ordinance, although the reasons are not so fully set out in section 12 as they are in the notice of motion, but I think are fully covered by the provisions of section 12, where it provides that "the award may be set aside where an arbitrator or umpire has misconducted himself, or the award has been improperly procured."

An action was instituted in this Court by the plaintiffs against the Klondike Mines Railway Co., the Dawson, Grand Forks, and Stewart River Railway Corporation, Limited, and Jerome A. Chute, who was the contractor for building the road, on 18th August, 1905, in which the plaintiffs alleged trespass, and claimed damages and an injunction against the defendants to prevent them from building or constructing their road over plaintiffs' property. The proceedings were afterwards amended, and the names of Thomas W. O'Brien and Hugh John Mackenzie, the present contractors, substituted for the name of Jerome A. Chute, the original contractor, who discontinued his contract.

Pursuant to the provisions of the Railway Act of 1903, on 23rd July, 1906 (and after the notice of intention to expropriate had been served on the plaintiffs and the usual affidavit of the Dominion land surveyor filed, in which he sets out that a plan of the land in question was deposited with the registrar of land titles at Dawson, and in which he states that the sum of \$300 offered to the plaintiffs, as compensation, by the defendants, is a fair compensation for the land and damages suffered by them), by order of this Court, Samuel L. Stanley, named by the railway company, David Cathcart, named by the claim-owners, and George Coffee, named by the Judge, were appointed arbitrators to determine the compensation to be paid thereunder by the Klondike Mines Railway Company to George E. Morley and R. B. Devlin, the plaintiffs, by reason of the location and construction of the railway over and upon their mining claim; the taking of the ground required therefor pursuant to the notice served upon the claim-owners, and the exercise of the powers of the railway company in relation thereto.

Samuel L. Stanley having refused to act as such arbitrator as aforesaid, one Edward Simpson was, by the order of this Court, on 26th July, 1906, appointed arbitrator in place of Stanley.

Two of the arbitrators, George Coffee and Edward Simpson, made their award on 2nd August, 1906, awarding to plaintiffs \$300 in full compensation for all claims for damages done and land expropriated by the Klondike Mines Railway Company, and on 28th September, 1906, David Cathcart, the third arbitrator, filed a separate award in which he awarded to plaintiffs \$3,000 as compensation for all claims for damages done and lands expropriated by the Klondike Mines Railway Company.

I have examined the evidence taken before the arbitrators, and also the affidavits filed on this motion before me. Defendants submitted no evidence before the arbitrators, and they, therefore, arrived at their conclusions on the evidence submitted by plaintiffs, and upon a personal examination made by the arbitrators themselves of the premises in question.

Plaintiff R. B. Devlin, in his evidence before the arbitrators, places the damages done to him by the expropriation by the railway company of a part of his claim, at \$3,000, and says that he has worked a considerable portion of this ground since 1898, and that the means that he could use for profitably working the ground in the future would be ground sluicing or hydraulic mining, and the fact of the railway track being placed as it is prevents him from so working his ground. On cross-examination by the arbitrators he says that he would get his water for hydraulic mining from Mosquito Creek in the spring and fall. When asked about the tailing grounds he was not sure that he had sufficient tailing grounds, even if the railway had not been there, but "pretty near." "The bed rock was pretty flat, and there would not be much grade." When asked if he could tell any of the values that he found in the prospect tunnel that he drove, he answers "No, I can't," but approximately says 5 or 6 cents. When asked as to how much of the claim was worked out, he answers "That I cannot tell you. You will have to look at that for yourself"; and is really not very definite, apparently relying on a personal examination of the ground by the arbitrators.

Mrs. Isabelle Devlin, wife of the plaintiff Devlin, gave evidence as to the amount of money taken out of the claim. In the year 1903, \$265; in 1904, \$2,357.25; in 1905, \$3,194.68. She was of opinion that over half the claim was left.

One George J. F. Stevens was also sworn, who said he worked on the claim in 1904, and says he thinks the whole mine is worth between \$5,000 and \$6,000; speaks of the manner of working the claim with the water in the spring and fall obtained from Mosquito Gulch, and thinks about \$3,000 a fair compensation. He is not interested in this claim, but in the claim just below, which is also the subject of arbitration in another suit. He says the railway track is practically all on bed rock or nearly so. This is all the evidence offered, except that on 31st July the following note appears: "The committee of arbitration reconvened pursuant to the notice of adjournment of the 27th instant. The arbi-

trators have made a personal inspection of the ground in question and made tests by means of panning."

In the award of Coffee and Simpson, the arbitrators give no reasons for the conclusions they have arrived at. Neither does Cathcart give any reason for the conclusions he has arrived at.

Under section 164 of the Railway Act it is not necessary that reasons should be given, and the award may not be set aside because of no reasons having been given.

In his affidavit on this motion Mr. R. B. Devlin says that he has operated the claim at a good profit, and has worked the same at intervals for several years past, "and only about one-third of the said claim is worked out." In his evidence before the arbitrators, he would not say how much ground had been worked out, but left that for the arbitrators to decide upon, when they made their personal inspection. He says that there are no culverts under the railway, and that the construction of such culverts would cost more than \$300, the sum awarded to him. He also reiterates his statement that he has suffered damage to the extent of \$3,000.

He further states that after the appointment of George Coffee as arbitrator he learned that he was, during the time he acted as such arbitrator, in the employ of a company that has bought up nearly all of the mining claims upon and adjoining Bonanza Creek, and that it is in the interests of said company to have such claims, before acquiring the same, placed at as low a valuation as possible, and consequently that Coffee is not a fair and impartial arbitrator. He further says that he is informed and believes that the arbitrator Simpson, although not publicly in the employ of the company referred to in paragraph 10, that is, the company by whom he alleges Coffee was employed, was, at the time of the arbitration, engaged in large deals with them, and consequently not a fit and proper person to act as such arbitrator.

An affidavit of David Cathcart, the third arbitrator, is also filed on the motion. He states that the construction of the culverts that it would be necessary to build under the railway track in order to operate this claim property, would cost more than the

sum awarded; that upon examining the claim with the arbitrators, and upon panning thereon in their presence, from prospects then obtained and from the evidence given before the arbitrators, the claim is damaged to the extent of \$3,000 as contended by the owners. He further says that "in considering this case the arbitrators Coffee and Simpson conceded that in order to work the claim, with the railway constructed as it is, it would be necessary to construct culverts as referred to in paragraph 5 of this affidavit, and no provision has been made for the cost of said culverts in the award."

The affidavit of Thomas W. O'Brien is filed in answer, in which he states he knows the arbitrators George Coffee and Edward Simpson and has known them since 1898; "that the said George Coffee has been actively engaged in placer mining in this country since the year 1898, and has been for several years the manager for the Anglo-Klondike Mining Company, Limited, and has been engaged in carrying on hydraulic mining; that the said Edward Simpson has also been engaged in mining operations in this country for several years, and has for the last two years been employed as manager for the White Channel-Gold Hill Hydraulics, Limited; that they are both practical mining men; that he (O'Brien) has lived in the Yukon Territory since the year 1887, and has an extensive knowledge of mining and mining operations, and, in his opinion, the said George Coffee and Edward Simpson are men of honour, and would not lend themselves to favour any party in any question upon which they were called upon to decide; that the grade of the railway across the claim in question is on bed rock, and prior to the construction of such grade the greater portion of the land occupied thereby was covered with tailing piles, which were removed by the contractors at great expense; that he knows the ground in question; has been over it and examined it, and believes the award made by the said Coffee and Simpson herein is just and reasonable."

A further affidavit is filed by C. W. C. Tabor, solicitor for the defendants. He states that he acted as solicitor throughout these

proceedings; "that after taking the evidence herein, the said arbitrators visited the mining claim in question, panned thereon, and went over the same to ascertain, as far as possible, what had been worked out, and the said George Coffee took measurements from different points thereon with a tape line; that the arbitrator George Coffee was appointed by Mr. Justice Craig pursuant to the provisions of the Railway Act, 1903, and such appointment was with the consent of all parties; that he knows the connection of the said Simpson with the company referred to in paragraph 12 of the affidavit of the plaintiff Devlin; the said Simpson being at the time engaged in negotiating a sale of the properties of the White Channel-Gold Hill Hydraulics, Limited, in which the said Simpson was interested to the said company, and it was to the interest of the said Simpson and the company which he represented to have the values of mining claims along Bonanza Creek placed at as high a value as possible, in order that he should obtain as high a price as possible for the properties which he represented."

This is all the material used before me on the motion. If the reasons given by Devlin in his affidavit for the arbitrator Coffee endeavouring to place the value of property as low as possible because he was, at the time, employed by a company who were buying mining claims on Bonanza, is a good reason for concluding that he was unfair or unjust, then I am at a loss to understand why he believes that the arbitrator Simpson arrived at the same conclusions as Coffee, because if he were at the time negotiating with the company which Mr. Coffee represented for the sale of his properties to that company, it would certainly be in his interest that the valuations should be placed as high as possible in order that he would obtain the best possible price for the properties which he owned, or was interested in.

Mr. Cathcart, in his affidavit, says that "upon the examination by the arbitrators of the ground, and upon the panning done in their presence, and from the prospects then obtained, he concluded that the amount awarded was far too small." He, however, neglects again in his affidavit, as he did in his award, to

enlighten the Court as to what were the prospects which he obtained. Absolutely no light whatever is thrown upon the matter by his affidavit, and he simply leaves the Court in this position, that after examining the ground and obtaining certain prospects which were known to him and the other two arbitrators, and which are in no way disclosed by any of the arbitrators to the Court, the conclusions the other arbitrators arrived at were improper conclusions, but the conclusion that he arrived at is the correct conclusion.

There undoubtedly is a great discrepancy between the conclusions arrived at by the arbitrators Coffee and Simpson and the arbitrator Cathcart. Cathcart places the damages at ten times the amount that is found by Coffee and Simpson. Undoubtedly the sum of \$300 is a very small amount to allow the plaintiffs if the claim in question is worth what they state in their evidence and in their affidavits. The arbitrators, however, were the judges, and in the evidence of Devlin, when asked to give definite statements as to the amount of ground worked out, as to the amount of prospecting done, and as to the actual values, he invariably invited the arbitrators to make a personal inspection. They did make that inspection; they measured the ground; they panned the earth; and the majority of them came to the conclusion that the damages to be awarded should be the sum of \$300. They give no reasons to shew the Court what prompted them to arrive at those conclusions; neither does the arbitrator Cathcart, who disagrees with them, enlighten the Court in this regard, either in his award or in his affidavit filed on this motion; and it is impossible for the Court to set aside an award unless corruption, partiality, misconduct, or irregularity, is distinctly proved against the arbitrators. Mere suspicion is not sufficient.

The following cases were cited by Mr. Black, counsel for the plaintiffs: *Benning v. Atlantic and North Western R.W. Co.*, 5 Mont. L.R. 136; *Re Ontario and Quebec R.W. Co. and Taylor*, 6 O.R. 338; *James v. Ontario and Quebec R.W. Co.*, 12 O.R. 624; *Great Western R.W. Co. v. Baby*, 12 U.C.R. 106; *Re Canada Southern R.W. Co. and Norvall*, 41 U.C.R. 195; *Re Hamilton and*

North Western R.W. Co., 44 U.C.R. 626; *Grand Trunk R.W. Co. v. Coupal*, 28 S.C.R. 531; *Re Armstrong and James Bay R.W. Co.*, 12 O.L.R. 137, 7 O.W.R. 713. Mr. Taylor cited the following cases: *In re Whitley and Roberts Arbitration*, [1891] 1 Ch. 558; *Morgan v. Mather*, 2 Ves. 15; Russell on Awards, pp. 354, 355; *Doberer v. Megaw*, 34 S.C.R. 125; *McRae v. LeMay*, 18 S.C.R. 282; *Morley v. Simpson*, L.R. 16 Eq. 226; *Re Hopper*, L.R. 2 Q.B. 375.

I have examined all these authorities and some of the cases referred to in the judgments of the Judges who gave the decisions, and I find no conflict of opinion in any of them. The result of all the authorities is that the Court will not interfere to set aside an award unless corruption, partiality, misconduct, or irregularity, is distinctly proved against the arbitrators, and mere suspicion is not sufficient; or unless the sum awarded is so grossly and scandalously inadequate as to shock one's sense of justice.

It was held in *In re Whitley and Roberts Arbitration*, [1891] 1 Ch. 558, by Kekewich, J., that "evidence of an admission out of Court by an arbitrator that he made his award improperly, as for example by collusion, or in consequence of a bribe, is not admissible in support of an application to set aside the award."

There is no evidence before me that would warrant me in finding corruption, partiality, misconduct, or irregularity on the part of the arbitrators Coffee and Simpson; nor am I warranted in coming to the conclusion that the award is so grossly and scandalously inadequate as to shock one's sense of justice, after reading the evidence submitted before the arbitrators and the affidavits filed before me on this application.

If I were to take the evidence alone, as offered before the arbitrators, I would conclude that the amount found by Coffee and Simpson was less than I should have found on the same evidence, but the plaintiffs invited and requested the arbitrators to visit the premises and make an inspection for themselves. They did make that inspection, and, after making that inspection, concluded that the damages they should award should be \$300, and

there is nothing before me, either in the evidence or affidavits, to shew that they did not arrive at the proper conclusion.

It would have been much better, in my opinion, had all of the arbitrators given reasons for their conclusions, but they were not bound to do so and did not do so, and I can only decide this application on the material before me, and after examining that material and the authorities submitted I am of opinion that this application should be dismissed with costs.

After the hearing of this application an application was made in this same case by Mr. Tabor, on behalf of the defendants, for payment out of the moneys deposited in Court under the order of Mr. Justice Craig when the matter was referred to arbitration. I reserved my decision, awaiting the result of the application to set aside the award, and stated at that time that if the application to set aside the award was not granted, the application of Mr. Tabor for payment out would be granted as a matter of course. Consequently I do now order that the application for payment out be granted.

ARBITRATION—AWARD.

YUKON TERRITORY.]

[MACAULAY, J.

HARRIGAN V. KLONDIKE MINES R.W. CO.

(5 West, L.R. 137).

Arbitration and award—Motion to set aside award—Misconduct of arbitrators—Gross undervaluation of mining claim in question—Interested motives alleged against arbitrators—Evidence—Disproof of charges—Railway Act—Payment out of Court.

APPLICATION by plaintiffs, similar to that in *Morley v. Klondike Mines R.W. Co.*, ante 109, to set aside the award of George Coffee and Edward Simpson, a majority of the arbitrators, on the ground that the award is unjust, improper, unreasonable, and grossly and scandalously inadequate, and that the same was made without regard to the evidence, and on the ground that the majority of arbitrators acted unfairly, improperly and not as fair or just arbitrators between the parties on such arbitration, or in making such award.

George Black, for plaintiffs.

C. W. C. Tabor, for defendants.

MACAULAY, J.:—The same arbitrators were appointed in this case as were appointed in the *Morley Case*, and the same conclusions arrived at as in that case, the arbitrators Coffee and Simpson awarding plaintiffs \$200, and the arbitrator Cathcart awarding plaintiffs \$3,000.

Defendants submitted no evidence, and plaintiffs' evidence was similar to the evidence submitted in the *Morley Case*, but not so strong in favour of plaintiffs, in my opinion, as the evidence was in the *Morley Case*, plaintiffs saying that they believe they actually suffered damages to the extent of \$3,000, but admit

that in the autumn of 1904 they bought a three-quarters interest in this claim for \$100; that the claim had been worked more or less since 1898 and was considerably "gophered"; that they allowed the claim to lapse in 1905, because there was not sufficient representation work done upon it; but they later state that they believed they had done sufficient work, although they did not know it at the time. They afterwards relocated the property. They assert that they could only work it profitably by ground sluicing or hydraulicing, but that they made no application for water rights, although most of the water was taken up by other persons. They did come to Dawson to see Mr. Beaudette, the government mining engineer, in regard to water rights, but as he was out of town they did not bother afterwards about securing their rights.

In my opinion, the evidence for plaintiffs is much weaker in this case than it was in the *Morley Case*. On the application to set aside the award, practically the same material is used before me as was used before me in the application in the *Morley Case*, or similar material. No greater reasons are shewn why this award should be set aside than were in the *Morley Case*, and, having arrived at the conclusion in the *Morley Case* that on the material before me I could not set aside the award, it is impossible for me to consider favourably to plaintiffs this application, and for reasons similar to those I gave in my judgment in the *Morley Case* I must dismiss this application with costs.

At the conclusion of the hearing of this application before me an application was also made by Mr. Tabor on behalf of defendants for payment out of the moneys deposited into Court under the order of Mr. Justice Craig referring this matter to arbitration. As in the *Morley Case*, I reserved my decision until the disposition of the application to set aside the award. That application having been refused, the order will now go for payment out of the moneys in this case, as requested.

NOTE.

Conduct of Arbitrators. An award was set aside where one of the arbitrators conducted himself as the advocate or agent of

the party appointing him, neglected to attend a number of meetings of the arbitrators or afterwards to read the depositions of witnesses taken at such meetings: *Brunet v. St. Lawrence, etc. R.W. Co.*, Q.R. 6 Q.B. 116. A ratepayer of a city which is a shareholder in and creditor of a railway is not thereby disqualified as an arbitrator: *Re McQuillen & Quelph Junction R.W. Co.*, 12 P.R. 294; nor will the Court interfere if the sum awarded is not such as to shock one's sense of justice: *Benning v. Atlantic etc., R.W. Co.*, 20 S.C.R. 177; but an award will be set aside if improper items are included; *Re Ontario, etc., R.W. Co. and Taylor*, 6 O.R. 338, or where the sum awarded was so excessive as to shew clearly that the arbitrators had disregarded the effect of the statute and had failed to consider the benefit done to the property by the railway as well as the damage done: *Great Western R.W. Co. v. Bailey*, 12 U.C.R. 106; so also an award was set aside where the arbitrators proceeded upon a wrong principle in estimating the amount awarded by taking an average of the different estimates put in evidence: *Grand Trunk R.W. Co. v. Coupal*, 28 S.C.R. 531 followed *Fairman v. City of Montreal*, 31 S.C.R. 210; and see also notes on "setting aside award" 3 Can. Ry. Cases 394, 395 and 396. This subject was somewhat discussed in *Re Doberer* and *Megaw*, 10 B.C.R. 48 and 34 S.C.R. 125 and Killam, J., for the Supreme Court at p. 130 says, "Undoubtedly an arbitrator should be careful to conduct himself not only with scrupulous fairness towards all parties, but also in such manner as to cast no suspicion on his honour and impartiality. But when he is not shewn to have been so situated towards any of the parties or the subject matter in dispute or otherwise as to render him unfitted to be an arbitrator in the matter there should be some proof of actual partiality or unfair action." Where a statute provided that the arbitrator might state a special case or that an adjournment might be taken for the purpose of enabling the parties to apply to the Court directing him as to the law and the arbitrator refused either to state a special case or to adjourn the arbitration to permit an application to the Court; the award was remitted back to him for further consideration: *Re Powell and Lake Superior Power Co.*, 9 O.L.R. 236 following *Re Palmer and Hosken* (1898), 1 Q.B. 286 at p. 295.

Canada.]

[Supreme Court.

JAMES BAY R. W. CO. v. ARMSTRONG.

(38 S.C.R. 511).

Appeal—Railway Act—Expropriation—Appeal from award—Choice of forum—Curia designata.

By sec. 168 of 3 Edw. VII. ch. 58, of the Railway Act, 1903, (R.S.C. (1906) ch. 37, sec. 209) if an award by arbitrators on expropriation of land by a railway company exceeds \$600 any dissatisfied party may appeal therefrom to a Superior Court which in Ontario means the High Court or the Court of Appeal (Interpretation Act R.S.C. (1906) ch. 1, sec. 34, sub-sec. 26) :

Held, that if an appeal from an award is taken to the High Court there can be no further appeal to the Supreme Court of Canada which cannot even give special leave.

PRESENT:—Fitzpatrick, C.J. and Davies, Idington, Maclellan and Duff, JJ.

Appeal from a decision of Meredith, C.J., of the Common Pleas Division of the High Court of Justice for Ontario, 12 O. L.R. 137, 5 Can. Ry. Cas. 306; increasing the award of arbitrators in proceedings for expropriation of plaintiff's land by the defendants.

The arbitrators awarded the plaintiff \$1,170 which he considered insufficient, and appealed to the High Court where it was increased to \$2,250. The Railway Company then took an appeal to the Supreme Court of Canada asking to have the original award of \$1,170 restored. The plaintiff by cross-appeal claimed that the increase allowed by the High Court was insufficient and that he was entitled to a much larger sum.

March 18, 1907.

Armour, K.C., and R. B. Henderson, for the appellants after arguing the case for a time on the merits were called upon to support the jurisdiction of the Court to hear the appeal.

For purposes of an appeal from an award under the Railway Act the High Court and Court of Appeal are on an equal foot-

ing. See Railway Act, 3 Edw. VII. ch. 58, sec. 168 and Interpretation Act R.S. [1906] ch. 1, sec. 34(26). If an appeal is taken to the High Court there is no further appeal to the Court of Appeal, *Birely v. Toronto, Hamilton and Buffalo Railway Co.*, 25 A.R. 88, and the High Court becomes the highest court of last resort in the Province for these cases. *Farquharson v. Imperial Oil Co.*, 30 S.C.R. 188.

DuVernet and Kyles, for the respondent referred to *Atlantic and North-West R.W. Co. v. Judah*, 23 S.C.R. 231, *The Province of Ontario v. The Province of Quebec*; *In re Common School Fund and Lands*, 30 S.C.R. 306.

The judgment of the Court was delivered by

April 1, 1907.

MACLENNAN, J.:—This is an appeal by a railway company and a cross-appeal by a landowner, in respect to the compensation to be allowed to the latter for land taken by the railway company for its track, and also for severance.

Arbitrators were appointed in the usual manner, and a majority award was made on the 29th December, 1905, in favour of the respondent for the sum of \$1,170.

From this award an appeal was taken by the respondent, in pursuance of section 168 of the Railway Act, 3 Edw. VII. ch. 58.

That section provides that whenever such an award exceeds \$600 any party "may appeal therefrom upon any question of law or fact to a Superior Court; and upon the hearing of the appeal, the Court shall, if the same is a question of fact, decide the same upon the evidence taken before the arbitrators, as in a case of original jurisdiction."

Sub-section 2 provides that: "Upon such appeal the practice and proceedings shall be, as nearly as may be, the same as upon an appeal from the decision of an inferior Court to the said Court, subject to any general rules or orders from time to time

made by the said last-mentioned Court, in respect to such appeals, which orders may amongst other things provide that any such appeal may be heard and determined by a single Judge."

By sec. 2(f) of the Railway Act, the expression "Court" means a Superior Court of the Province or district, and by the Interpretation Act, R.S.C. [1906] ch. 1, sec. 34(26), "Superior Court" means, in the Province of Ontario, the Court of Appeal for Ontario and the High Court of Justice for Ontario.

By sec. 65 of the Judicature Act of Ontario, it is provided that every action and proceeding in the High Court, and all business arising out of the same, except as hereinafter provided, shall, so far as is practicable and convenient, be heard, determined and disposed of before a single Judge.

In pursuance of these enactments, the landowner, who had the option of taking an appeal from the award, either to the High Court of Justice, or to the Court of Appeal for Ontario, took it to the High Court, and it was heard before a single Judge, viz., before Meredith, C.J., who increased the compensation due from the company to the sum of \$2,250.

From that judgment the present appeal was brought by the company, whereupon the landowner, by way of cross-appeal, claimed in his factum, that the sum awarded to him by the Chief Justice, was insufficient and should be largely increased.

Upon the opening of the appeal, a question was raised by the Court with respect to its jurisdiction, and an opportunity was given to counsel to argue that question, as well as the merits.

Having heard the argument and also an application for leave to appeal, we are all of opinion that there is no jurisdiction to hear the appeal, either with or without leave, and that the appeal should be quashed.

Precisely the same question arose in this Court in 1901, on a motion for leave to appeal to this Court from a judgment of a Judge of the High Court of Ontario, increasing the sum awarded by arbitrators to a landowner against a Railway Company, and the application was refused. That was the case of the *Ottawa Electric Co. v. Brennan*, 31 S.C.R. 311.

The case of *Birely v. The Toronto, Hamilton and Buffalo R.W. Co.*, 25 A.R. 88, was there referred to with approval in which it was held that no appeal lay from the Judge of the High Court to the Court of Appeal in such a case, both those Courts being designated by the statute as special tribunals, to either of which the appellant might resort.

The appeal and cross-appeal, and also the motion for leave will therefore be dismissed without costs.

Appeal dismissed without costs.

Solicitors for the appellants: *Royce and Henderson.*

Solicitors for the respondent: *Bull and Kyles.*

A petition has been presented to the Judicial Committee of the Privy Council, for leave to appeal from the decision of the Supreme Court.

NOTE.

Appeal from award.

Section 168 of the Railway Act of 1903 is now section 209 of R.S.C. 1906, ch. 37 where it appears with some modifications in sub-section one. The right of appeal to the Supreme Court is different in detail in the different provinces, and that will no doubt explain why in Quebec an appeal will lie to the Supreme Court as in *Grand Trunk R.W. Co. v. Coupal*, 28 S.C.R., 531, or to the Privy Council, as in *Atlantic and North Western R.W. Co. v. Wood* (1895), A.C. 257, where, in Ontario, a similar appeal to the Supreme Court will not lie unless the only provincial appeal allowed by the Railway Act from an award is taken direct to the Court of Appeal for Ontario under the provisions of R.S.C. (1906), ch. 1, sec. 34 (26), including that Court in the term "Superior Court" when applied to that Province. The result of the decisions appears to be that the Supreme Court of Canada will not hear an appeal from an award unless the previous appeal has been to the Court of Appeal and that the only way to reach the latter Court is to appeal direct to it from the award of the arbitrators. The somewhat curious result will ensue where a dissatisfied party to an award appeals, as in the case now reported, to a Judge of the High Court of Justice, and obtains a favourable decision that the other party who thereby becomes the one dissatisfied cannot appeal in order to have the award restored because he cannot go to the

Court of Appeal: *Birely v. Toronto, Hamilton & Buffalo R.W. Co.*, 25 A.R. 88, and cannot go to the Supreme Court: *James Bay R.W. Co. v. Armstrong, supra*. Apparently it is necessary (a) to induce or compel one's opponent in a doubtful case to appeal to the Court of Appeal, or (b) to appeal to the Crown through the Privy Council to exercise its prerogative and hear the appeal as an indulgence, or (c) to rely upon the right which still exists in certain cases of a limited nature of setting aside the award on the ground of invalidity at Common Law. The provisions of the Supreme Court Act, governing appeals from the various Provinces and embodying all amendments are now to be found in R.S.C. ch. 139 (1906), sections 35 to 49.

EXPROPRIATION—IMMEDIATE POSSESSION.

ONTARIO.]

[MACMAHON, J

RE WILLIAMS AND GRAND TRUNK R.W. CO.

(8 O.W.R. 277.)

Expropriation—Immediate possession—Necessity for—Station site—Plans not prepared—Sec. 170 Railway Act, 1903.

A railway company having obtained an order from the Board authorizing it to take the lands of the owner for the purposes of a station the company made a motion under sec. 170 of the Railway Act, 1903, for an order for immediate possession of the said lands.

Held, that as the affidavits failed to shew that the railway company was ready forthwith to proceed with the erection of the station, the motion must be dismissed but without prejudice to the right of the railway company to renew the motion when the conditions have changed.

MOTION by the Grand Trunk Railway Co. for an order for immediate possession of part of water Lot No. 49 according to Plan 5a, and land adjoining the same to the north, in the City of Toronto, set out by metes and bounds in the notice of motion.

M. K. Cowan, K.C., for the Railway Company.

W. E. Middleton, for the A. R. Williams Co.

August 10, 1906. MACMAHON, J.:—On 23rd February, 1905, in pursuance of an application made by the Grand Trunk Railway Company to the Board of Railway Commissioners, an order was made authorizing the railway company to take for the purposes of a station, etc., the said lands, the property of the A. R. Williams Company.

Arbitrators were, during the month of July last, appointed to decide as to the value or compensation payable to the owners, but as yet no award has been made in the premises.

By section 170 of the Railway Act, 3 Edw. VII. ch. 58, where an award has not been made, a warrant for possession shall be granted by a Judge on affidavit to his satisfaction that the immediate possession of the lands is necessary to carry on the railway, with which the company are ready forthwith to proceed.

The affidavits on which the motion was launched were made by Edward Donald, of Montreal, barrister, who is the tax and land agent of the Grand Trunk Railway Company, who states that he is familiar with the values of property in the vicinity of the property in question and he considers the sum of \$112,500 a fair value and a liberal compensation for the right, title and interest of A. R. Williams in the lands in question.

Another affidavit made by Walter G. Brownlee, a superintendent of the railway, states (paragraph 8) that immediate possession of the said lands by the railway company is necessary in order to enable them to remove the building and prepare the ground for the station, all as set out in the order of the Board of Railway Commissioners, and with which said work the Grand Trunk Railway Company are ready forthwith to proceed.

When cross-examined on his affidavit, Mr. Brownlee said that the plans for the station had not yet been completed; that the size of the building was not yet known; and that so far as he knew no contracts had been let for the erection of the building; and the only preparations made for the erection of the building were the instructions given to him to clear up the debris remaining on the lands intended for the station since the great fire in 1904.

Mr. Hays, the general manager of the Grand Trunk, made an affidavit after the motion had been set down, and that I allow to be read, in which he says that architects are preparing the plans for the station, and, when the plans have been decided upon, the contract will be let and work commenced on the station during the coming autumn, and will be continuously and vigorously carried on until completed.

The affidavits wholly fail to shew that the company are ready forthwith to proceed with the erection of the station, as the contract, according to the affidavit of Mr. Hays, is not to be let until the coming autumn, and it may be very late in the autumn before it is let.

The motion will be dismissed with costs, but without prejudice to the right of the railway company to renew the motion when the conditions have changed.

NOTE.

The details of this case are set out in the *Burnt District* case No. 25, 4 Can. Ry. Cas. 290 and *Williams v. Grand Trunk R.W. Co.* *ib.* 302, reported on other points. The provisions of the Railway Act 1903, governing the taking possession of lands, now appear in the Railway Act 1906, sections 215 to 220. By section 218 embodying 6 Edw. VII. ch. 42, sec. 11, provision is now made for payment of the compensation into Court instead of into a chartered bank, as was the case under the Railway Act 1903, section 171.

EXPROPRIATION—FILING PLANS.

YUKON TERRITORY.]

[CRAIG, J.

DAY V. KLONDIKE MINES R.W. Co.

(2 West L.R. 205).

Railway—Expropriation of lands—Orders in Council—Board of Railway Commissioners—Railway Act, 1903, sec. 122, sub-secs. 1, 5, secs. 132, 133, sub-secs. 1—Rights of placer miners—Open mines—Deposit of waste—Licenses—Renewal—Plan of line of railway—Omission to file—Injunction—Compensation—Jurisdiction of Territorial Court—Remedy—Arbitration.

The defendants claimed the right to construct their railway under the authority of certain orders in council having obtained the approval of the Board and Minister of the Interior of a route map referred to in sub-sec. 1 of sec. 122 of the Railway Act, 1903, but not that referred to in subsec. 5 of sec. 122:—

- Held*, 1. Before the defendants could expropriate land without the consent of the owners they must comply with the provisions of the Railway Act, 1903.
2. Placer miners are owners within the meaning of the Railway Act, 1903, and entitled to compensation.
3. A placer mine is an open mine within section 132 of the Railway Act, 1903.
4. The plaintiffs were entitled to an injunction restraining the defendants from constructing their works and injuriously affecting the working of the plaintiffs' placer mining claims held by them under licenses issued under the placer mining regulations, secs. 132 and 133, Railway Act, 1903, *Yale Hotel Co. v. Vancouver, Victoria & Eastern R.W. & Navigation Co.*, 3 Can. Ry. Cas. 108, followed.

Action by Albert H. Day against the Klondike Mines R.W. Co., the Dawson, Grand Forks, and Stewart River R.W. Corporation, and Jerome A. Chute, and 6 other actions by different plaintiffs against the same defendants.

H. E. Ridley, for plaintiffs, Day, Treadgold, and Boyle.

Frank J. Stacpoole, for plaintiffs, Hamilton and N.A.T. & T. Co.

George Black, for plaintiff, McDonald.

R. L. Ashbaugh, for defendants.

September 2, 1905.

CRAIG, J.:—The defendants the Klondike Mines Railway Company are a company incorporated under ch. 72 of 62 & 63 Vict., empowering them to build a railway from Dawson City up the valley of Bonanza and on in the route laid down in the Act, and, as is usual, the Railway Act applies to the company; and Chute is the contractor to build the railway.

The standing of the other defendants is not very clearly defined either by themselves or by the plaintiffs. However, that little affects the judgment.

Two orders in council have been submitted to me upon this matter, which refer to other orders which have not been submitted. The first order in council is one of 4th September, 1900, which refers to a memorandum of 27th August, 1900, not produced. This order in council recites that "under the new plans proposed to be filed it is intended to locate the line of railway on the higher ground so as to avoid interference with creek claims upon Bonanza and Eldorado and other creeks." These are the creeks, I may say, up which the railway will run. The order in council further goes on to state that "the Minister is of the opinion that everything should be done to facilitate the early construction of the said line of railway," and further recommends that "the said railway company be granted the right to enter upon and occupy Crown lands which may be found necessary for the proposed construction of their works, the right of way not to exceed 60 feet except where a larger amount is required for station grounds and other railway purposes. The railway company shall be required in all cases where a mining claim is entered upon or occupied to compensate the owner or beneficiary of such claim for actual damage only caused to such owner or beneficiary upon occupation of such claim by the railway company, such damages to be assessed in the manner provided by the Railway Act. The right of way herein provided for and authorized shall not be acted upon, nor shall any Crown lands or mining claim be entered upon by the railway company unless and until complete plans of the railway company's pro-

posed line shall have been filed and approved by the Minister of the Interior."

No operation was commenced in the way of construction of the road until the spring of this year or last autumn; but the matter in dispute in this action had not become acute until the railway company attempted to cross some mining claims in operation or intended to be operated in the future.

By order in council of 7th January, 1905, referring to a memorandum of 3rd December, 1904, not produced, it was recited that authority was given for entering into a contract with the railway company for the construction, under a subsidy granted in 1903, of the railway in question. The time was extended until 1st January, 1905. And there is a further recommendation that "Now that the company have furnished the necessary details, the contract to be entered into with them under the said order in council be based on the general terms and conditions for subsidies granted by the Subsidy Act fixing grades and curvatures." "Further recommends that the route indicated by a full red line on a route map shewing the proposed line of railway from Klondike and Dawson City, via Grand Forks, to the Stewart River, 84 miles, copies of which are hereto attached, be approved accordingly." "Further recommends that the location indicated by the said plan and profile from Dawson City, a distance of about 12 miles, be approved accordingly." The plan filed, and which is produced and admitted to be the one referred to in this order in council, is not a plan in accordance with the Railway Act and one which should be filed before the compulsory clauses of the Railway Act are enforced against resisting owners. The plan is no more than a general route plan. It does not give nor describe the particular properties which the line crosses by their boundaries nor the names of owners; and the reference book contains no descriptions or quantities whatever. It is a plan in no respect complying with the provisions of the Railway Act and necessary to be filed before compulsory expropriation of lands takes place. It strikes me as being such a map as is referred to

in sub-sec. 1 of sec. 122; not the plan referred to in sub-sec. 5 of the same section. However, such a plan as it was, it was not filed with the registrar of deeds in this Territory, as is required by the Act.

It is contended that this plan having been approved by the Board of Railway Commissioners of Canada and by the Minister of the Interior, no further question can arise upon its validity or its compliance or non-compliance with the Railway Act; that such approval overrides the provisions of the Railway Act. By a letter from the Minister of the Interior of 18th January, 1902, this plan is recited as having been certified and approved by the Deputy Minister of Railways and Canals, filed in the Department of the Interior, approved by the Honourable James H. Ross, commissioner of the Yukon Territory and approved by the Minister. The letter is to the solicitor of the company, and promises upon completion of each section of the line that letters patent will be issued to the railway company of the land required so far as the same is vested in the Crown, and provided the conditions of the annexed order in council shall have been in the meantime complied with. The annexed order in council has not been produced to me. This letter of approval provides that "when it is found necessary to make any deviation in the line of railway at one or more points along the line, as now shewn by the plans before referred to, because of obstacles, the same shall be considered the true and correct right of way and be dealt with in the issue of patents as heretofore mentioned as if the deviation or deviations formed part of the line as shewn by the present plans, and so soon as satisfactory corrected plans and profiles of that part of the line in which such deviation or deviations shall have been made have been filed in the Department of Railways and Canals and in the Department of the Interior and approved by the Deputy Minister of Railways and Canals, patents will issue for the lands covered by the deviation." The final clause of the letter recites that "it is in the public interest that everything possible and proper shall be done to facilitate the early construc-

tion of the road, and the Minister authorizes the company to enter upon any Crown lands crossed by the line of railway as shewn by the said plans for the purpose of constructing the said railway;" the general contention of the railway company being that the railway crosses placer mining claims which are not owned by the placer miners who hold licenses under the placer mining regulations; that all the miners are entitled to is the right to extract the gold from the ground in the first place; that they have no surface rights whatever; that these surface rights remain in the Crown and can be disposed of by the Crown by order in council on the recommendation of the Minister of the Interior under sec. 47 of the Dominion Lands Act. They further contend that the placer miner is only entitled to hold his ground for one year after the issue of his license or grant, and that on the expiration of a year, if in the meantime the Crown has, by the Minister of the Interior or by order in council, granted to any person any rights over these claims; then the miners having the rights of renewal take that renewal subject to such grants and rights as the Minister of the Interior has seen fit to impose upon the lands. It is contended, under the authority of *Chappelle v. The King*, 32 S.C.R. 586, and carried on appeal to His Majesty's Privy Council (the judgment of which Court I have, of 2nd December, 1903), that the placer miner has no right of renewal. By this judgment it was held that the placer miner has no right of renewal in his claim; it is by the grace of the Crown that he obtains his renewal; and that he has no absolute right to any such renewal. The words of the judgment of the Privy Council are: "Their Lordships, therefore, are of opinion that the placer miner, on renewal, holds under an annual grant in substitution for but not in continuation of his original grant; he has no absolute right to renewal; he has no doubt a preferential right of renewal, because no interloper can be in a position to make the affidavit required to entitle him to a grant of the claim so long as the original occupant complies with the requirements of his grant and applies in due time for renewal." The judg-

ment further decides that the miner takes his renewal subject to all changes in the regulations; that he does not hold his license under the regulations existing at the time he obtained his original grant. The regulations at the time this judgment was pronounced differ slightly from the regulations in force to-day or in force when the orders in council affecting this railway company were passed. That judgment was pronounced under the regulations of 1889, and by sec. 20 of those regulations it is provided that "the entry of every holder of a grant for placer mining must be renewed and his receipt relinquished and replaced every year, the entry fee being paid each time." The form of grant provided for by the regulations of that date differs very slightly, if at all, from the form in force to-day. It is a grant for a year subject to the regulations. The regulations to-day, however, are different in this respect, the law now being that a free miner, having duly located and recorded a claim, "shall be entitled to hold it for the period for which he received entry and thence from year to year by recording the same." The section further goes on to provide for representation work, which keeps the claim alive. Under sec. 34 of the present placer regulations it is provided that "a free miner may obtain entry for one or five years." Then sec. 41(a) is a decided alteration of the old law, because it provides for entry for the period for which the free miner received entry, which may be one or five years, "and thence from year to year by recording the same." These words must mean something, and the natural meaning is that a free miner, duly observing the regulations and performing the work which he is required to perform under this section and sub-section, is entitled to a renewal from year to year by re-recording. It is true that the former regulations, under which *Chappelle v. The King* was decided, provided for renewal, and it may be that the words now used in the present regulations have no greater or stronger force than the provisions of the former regulations. But, apart from the view which I entertain on this matter, that the miner has a right now of renewal which the

Crown recognizes under the very order in council which the railway company invoke as the authority for the powers which they propose to exercise over these lands, direct provision is made for compensation of the miners. The order in council indicates also that the rights of the miners were in the contemplation of the Minister and of the government when the orders in council were passed; that it was contemplated at that time that the road should run upon the higher levels and not cross the low-lying portion of the valley in which the more valuable placer deposits existed.

As I have already stated, no proper plan under the Act has been prepared or filed, and no plan at all for deposit in this district until long after the railway had commenced its construction and until after these actions were instituted.

The plaintiffs now ask for an injunction to restrain the defendants from proceeding with the construction of their work upon several grounds, the main ground being that they have not complied with the Railway Act in not filing proper plans and books of reference; secondly, that they are crossing open mines now in operation and injuriously affecting the working of those mines; that they have not offered compensation; that they willfully obstructed plaintiffs in obtaining any information as to the railway company's powers, and (this is sworn to and not denied) that plaintiffs on several occasions, by their solicitors, asked for copies of these orders in council, asked for information respecting the plans, route of the railway, the lands to be taken, and the powers intended to be exercised by the company, but were absolutely refused any information whatever upon these points. It is also in evidence that the engineer for the railway company could not ascertain from the map of the company, which was approved by the Minister, where any particular piece of property lay, but that in one instance he had to resort to the plan prepared by the engineer for plaintiffs. It is quite evident to any one that an owner could not from a perusal of the plan now on file, and which was the plan under which the company were

working, ascertain for himself what portion of his mining claim was being taken or what powers the company intended to exercise in respect to it. The railway company take the broad ground that they are not subject to the provisions of the Railway Act, either in the matter of compensation for the lands taken or with reference to the provisions of the Act requiring these plans and profiles to be prepared and filed. As to the preparing and filing of the plans, I think the railway company are bound by the Railway Act in regard to this matter. I do not think that any order in council can override a direct provision of the Act of Parliament in this respect, and I do not think that the order in council intended to override the Act of Parliament. For authority upon these points I would refer to the case of *Murphy v. Kingston and Pembroke R.W. Co.*, 11 O.R. 302; also to the same case as reported in 17 S.C.R. 582; also to the case of *Brooke v. Toronto Belt Line R.W. Co.*, 21 O.R. 401. I am, therefore, of opinion that before a railway company or this railway company can expropriate lands without the consent of the owners, they must file proper plans provided for by the Railway Act.

It is contended that the placer miners are not owners within the meaning of the Railway Act, and are not entitled to notice. I do not think that this contention can be maintained. As to who is the owner I would refer to *Stewart v. Ottawa and New York R.W. Co.*, 30 O.R. 599. There it was held that the person in possession even under a defective title must be dealt with in the meantime as the owner; that the company cannot even in the case of a defective title ignore the person who actually occupies the land. The owner is defined by the Railway Act as "any person who is enabled to sell and convey the land." And it is argued that the placer miner not being able to convey is therefore not an owner within the meaning of the Railway Act. The placer mining regulations empower the claim owner to sell, convey, and mortgage his claim. It is true he can convey no interest in the surface beyond what the placer regulations give him. But these he can convey. What the rights of a placer

owner are in the surface I have already decided in the case of *Peterson v. Loudon*, decided in August, 1901, in this Court, where I held (and that judgment has not been disturbed so far) that "the placer miner had such rights in the surface as he needed in order to wrest from the soil all the placer gold lying in it;" that how far he could use the surface was entirely dependent upon the nature of the mineral to be won from the soil and from the nature of the operations which he would have to carry on to wrest the gold or mineral from the soil. Placer mining operations are carried on in diverse ways in this country; by sinking shafts and from the shafts drifting or tunnelling underneath the soil and hoisting the pay dirt to the surface; by open cuts where the entire surface of the soil is broken up and the whole of the ground is either washed away or put through sluice boxes; by hydraulics and by dredging; and I am of opinion that the Crown intends by its grant to give to the miner such use of the surface as is needed in carrying on those various operations in the most economical and miner-like manner, and if necessary that the whole surface of the soil should be disturbed and put through water, then the miner has the right to so use the surface. Therefore, I think that the miner has a very well defined and real interest in the surface of his mining claim, such an interest as entitles him to be considered by a railway company crossing his property.

Counsel for the railway company also contended that this Court had no jurisdiction at all in the matter of the respective rights of the parties to these actions; that the jurisdiction resided solely in the Board of Railway Commissioners; that this Court would be bound by their judgment, or they would not be bound by the judgment of this Court in any question of fact, and the finding of this Court would only be *prima facie* evidence of fact; that the Board might sit upon this question and adjudicate upon all rights of the parties and would not be bound by any judgment of this Court; and that it would be useless for this Court to proceed to consider the case at all in that view. I cannot accede to

that argument. Nowhere in the Act is the Board of Railway Commissioners given exclusive authority to deal with railway questions of this nature, and this Court will certainly not declare that it has no jurisdiction to grant an injunction when the railway company proceed to take the lands of private individuals without having complied with the provisions of the Railway Act. I think there is full power in the Court to grant an injunction, if it thinks fit, under the circumstances arising in this case or in any other case of like nature.

Two serious questions are presented here for settlement beyond the ones I have mentioned. First is the question of open mines. By sec. 132 of the Railway Act it is provided that "no company shall, without the authority of the Board, locate the line of its proposed railway nor construct the same or any portion thereof so as to obstruct or interfere with or injuriously affect the working of or the access or adit to any mine then open or for opening which preparations are at the time of such location being lawfully and openly made." Sub-section 2: "The company shall not be entitled to any mines, ores, metals, coal, slate, mineral oils, or other minerals in or under any lands purchased by it or taken by it under any compulsory powers given it by this Act except only such parts thereof as are necessary to be dug, carried away, or used in the construction of the works, unless the same have been expressly purchased, and all such mines and minerals except as aforesaid shall be deemed to be excepted from the conveyance of such lands unless they have been expressly named therein and conveyed thereby." Section 133 provides that "no owner, lessee or occupier of any such mines or minerals lying under the railway or any of the works connected therewith, or within 40 yards therefrom, shall work the same until leave therefor has been first obtained from the Board." These sections are very far reaching and serious ones as affecting placer mining in the lands crossed by the railway.

It is contended that a placer mine being operated by open cut work is not an open mine, and I shall refer to the case of

Davvell v. Roper, 24 L.J. Ch. 779, where in the judgment of Kindersley, V.-C., he defined mining as follows: "Mining is when you begin at the surface and by sinking shafts you work underground in a horizontal direction, making a tunnel as you proceed and leaving a roof overhead." That perhaps is the general acceptation of the word "mining" in England, which is really undermining; but I do not think that under the subsequent authorities that definition is now good law. In Stroud's Judicial Dictionary the word is considered. It is there said: "The primary meaning of the word 'mine,' standing alone, is an underground excavation made for the purpose of getting minerals. In leases and similar documents it is commonly used in a slightly different sense, as a mine is considered a seam or vein of coal, and the word includes a stratum of the minerals as well as the excavation made to win it. Minerals on the other hand mean primarily all substances other than and underneath the agricultural surface of the ground which may be got for manufacturing or mercantile purposes, whether from a mine, as the word would seem to signify, or such as stone or clay, which are got by open working." And the author cites several cases to be found at p. 475. It was held in *Midland R.W. Co. v. Robertson*, 37 Ch. D. 386, 15 App. Cas. 19, that "mines" ought to receive the widest possible construction short of straining the language, when the word is mentioned in sec. 78 of the Railway C. C. Act, 1845. Brick clay has been held to be a mineral and china clay and freestone and limestone got by open workings. I would also refer to the law of mines by Barringer & Adams, as to the meaning of "open mine," and to Lindley, p. 852 et seq., defining the various sorts of mining,—quartz vein mining, drift mining, and placer, sluice mining and hydraulic mining, all being considered open mines; also to the case of *Elias v. Griffith*, 8 Ch. D. 521.

I am of opinion that any mine is an open mine which is being operated for the extraction of minerals by any of the methods employed by miners for that purpose; that a mine is open as soon as miner-like operations are begun upon it to extract the mineral

from the soil either by open cut, ground sluicing, hydraulic mining or drifting or dredging. These open mines affected by the crossing of the railway company are placer mines, part of them being worked out and part still remaining to be worked. Compensation will cover all damages. How much the compensation shall be is not for me to determine now; I mean how far the compensation shall go. If the miner is restrained from operating his mine within 40 yards of the railway right of way, then his mine is rendered useless. The miner each year must do \$200 worth of work on his claim to keep it alive, and it might happen that 40 yards on each side of the track would take in the entire valuable ground, in fact, the entire claim, depending wholly upon the nature of the ground. Compensation might involve payment for the entire claim and its contents and appurtenances. The company cannot operate these mines themselves, because sub-sec. 2 of sec. 132 provides that they shall not be entitled to the mines or ores. How far they might be entitled to operate them if they obtained them by purchase and obtained the whole of the ground, I will not pretend to determine. The difficulty is to allow a railway to be constructed up this valley and to conform to the Railway Act in respect to both these sections. The Act is positive in its provisions—"The railway shall not, without the authority of the Board, locate its line so as to injuriously affect the working of an open mine." The line affects the open mine in two ways, first, it prevents the extraction of the mineral from the placer ground; it also prevents the use of the balance of the claim already worked out, for the deposit of tailings. The first damage might be fully compensated for by payment; the second it is almost impossible to estimate. And a very serious question of law arises,—whether a miner has any right at all to deposit tailings upon the balance of his claim which is worked out, except such tailings as are taken from the very claim itself, which he is operating, or whether he has the right to acquire a claim under the placer regulations for a dumping ground, I very much doubt. In one of the cases before me, namely, the case of Day,

the miner is using the creek claim, or the part of it worked out, for the deposit of tailings from hillsides or bench claims adjoining.

The railway company contend that without the fee from the Crown he has no right to use the ground for any such purpose. His license allows him only to extract the gold and to make such use of the ground as is necessary for extracting the gold from the particular claim which his license covers, and that once the gold is extracted, his right to that claim ceases, and that the claim cannot be used for any other purpose and particularly not used for the purpose of depositing debris, deads, or waste from other claims. That is a very serious question of law, which I will not pretend to determine now without further argument and further authority. I can only say that the argument is a strong one and strikes me as having very great force. This question of tailings is a serious one in this country any way, and would be most serious if miners were allowed to throw their waste over unused government lands so as to obstruct the building of a railway over those government lands.

As to the claims not being worked I have less difficulty. I think the Crown has a right to grant to the company the right to cross these claims and that the miner must resort to the Railway Board for leave to operate after the crossing. The difficulty of fixing compensation afterwards I have nothing whatever to do with now. It remains then for me to determine what I should do in the present instances. The plaintiffs urge that the company, not having complied with the Railway Act up to this time, must be restrained and the injunctions must stand. The company contend that the Court has no right to issue an injunction; that the sole remedy of these people was by arbitration under the Railway Act. I think that the Court has a right to enjoin the railway company, and for authority I would cite *Yale Hotel Co. v. Vancouver and Victoria*, 3 Can. Ry. Cas. 108. There are other authorities, some of which I have already cited, to same effect. I think the Court has clearly power to enjoin the

railway company when proceeding to take lands without the consent of the owner and not having complied with the provisions of the Railway Act.

As to the open mines, namely, the property of McDonald and Day and the N.A.T. & T. Co., the injunction will stand in the meantime until further evidence is given as to how far the crossing of the road will injuriously affect future operations, and I would suggest in this connection that, as the engineer for the Railway Board is now in the country—has indeed, as I understand, come on a special mission in regard to this very railway—his report on the matter might be presented to me, and I shall then determine whether the injunctions in respect to these claims will stand or not.

As to the other claims, as soon as the railway company file a proper plan under the Act and serve their notice of expropriation and settle the compensation, the injunctions will be removed, and the matter will stand in that condition in the meantime.

It is urged that the season is advancing and the railway company need to proceed speedily, as during our winter months, which are coming on soon, no operations can be gone on with, and the contractor is under a large pecuniary penalty for non-fulfilment of his contract. In this connection I may say that the railway company should have thought of this sooner; but the provisions of the Railway Act are open to them, and if they can shew me that speed is required, upon complying with the Railway Act as to deposit of a sum to cover compensation, after arbitrators have been appointed and have viewed the ground, I will consider favourably any application to remove the injunction to enable the company to continue building the road where needed this autumn.

All questions of costs will be reserved.

Since writing this judgment I have seen the engineer for the Board of Railway Commissioners, and he reports to me that there is some intention of changing the line so as to avoid open claims,

and if so, the matter can be mentioned again. My own impression was (and it is confirmed by the report of the engineer) that the line will not injuriously affect the working of the N.A.T. & T. Company claim, although it is in operation; and the general order will apply to it.

All other questions, as well as costs, are reserved, to be mentioned again.

NOTES.

Expropriation of Mines.—Where under the English Railway Clauses Consolidation Act 1845, sec. 78, a mine owner is required by notice from the railway company to leave unworked a portion of his mine in order to afford the necessary support to the surface, the compensation payable in respect of the part left unworked is not profit but indemnity for damages accrued to the owner by reason of the embargo of the railway company which prevented the working of this particular part covered by the notice, and in calculating the value to the owner of his interest thus damaged all the surrounding circumstances must be considered, including those that tend to diminish the injury that has accrued, damages being assessed on the theory that the owner is to get only what he would be entitled to under a fair bargain and nothing beyond: *Joicey v. North-Eastern R.W. Co.*, (1906), 1 K.B. 195 (1907), 1 K.B. 402. Where there is a conveyance of land on either side of and adjoining a railway with the minerals thereunder, the railway being one of the boundaries of the land so conveyed, there is no presumption, as in the case of a highway, that subject to the right to use the highway the purchaser of the land adjoining is entitled to the minerals under one half of the railway: *Thompson v. Hickman* (1907), 1 Ch. 550. Under section 71 of the Railways Clauses Consolidation (Scotland) Act (1845), corresponding to section 78 of the English Act, where a railway company has given notice to a mine owner not to work his minerals and has paid the compensation fixed therefor, the company is not thereupon entitled to a conveyance of the minerals: *Hamilton's (Duke of) Trustees v. Caledonian R.W. Co.*, 7 F. (Ct. of Sess.) 847.

Power to Expropriate.—Where the special Act incorporating a railway provided that its powers of compulsory purchase should expire in 1864, but in order to protect its roadbed it arranged

to purchase the coal under a portion of its line in 1899, it was held that it was competent for the railway company after the expiration of the time limited by its special act to acquire land reasonably necessary for and incidental to its business; that is the maintenance of its line: *Thompson v. Hickman* (1907), 1 Ch. 550.

Compensation.—Where compensation for taking part of a house, had been under discussion between representatives of a land owner and a public body with a view to its expropriation; but no agreement had been executed providing for payment nor conferring upon the latter the right to take the portion under discussion; it was held that the arrangement made as to price did not bind the principals until they had accepted it and that the land owner might withdraw from the negotiations and serve notice to take the whole of his house under the provisions of the Statute: *Pollard v. Middlesex*, 95 L.T. 870.

LIABILITY OF RAILWAY COMPANIES FOR FIRES.

BRITISH COLUMBIA.]

[SUPREME COURT.

BLUE v. RED MOUNTAIN R.W. Co.

(5 West L.R. 1).

*Railway—Negligence—Fire—Destruction of property in neighbourhood—
Right of way—Findings of jury—View—Misdirection—Non-direction—
Damages—Railway Act, 1903, sec. 239.*

A fire starting on or near the right of way of a railway company caused by one of their locomotives spread or jumped to the property of the plaintiffs, which was destroyed.

The defendants contended that the rocky bluff where the fire started was not within their right of way, that sec. 239 of the Railway Act, 1903, applies only to property upon or along the route of the railway and did not apply to that of the plaintiffs, which was three miles distant:—

Held, Martin, J., dissenting, that the question of how the fire reached the plaintiffs' property and the position of the rocky bluff were properly left to the jury.

2. That the word "along" in section 239 does not mean only "adjoining to" or "contiguous to," as does the word "alongside," but "in the neighbourhood of" or "near" or "close to" and receives additional force from the expression "upon or along" not simply "along."

The jury found a general verdict for \$18,000. It was urged that under section 239 the damages could not exceed \$5,000, but,

Held, that the finding that the defendants left inflammable material on the right of way disposed of that objection and the defendants were liable for the full amount as found by the jury.

APPEAL by defendants from judgment of MORRISON, J., in favour of plaintiffs, upon the verdict of a jury in an action to recover the value of timber, cordwood, tram roads, bridges, etc., destroyed by fire alleged to have been started on or near the defendants' right of way from a locomotive belonging to defendants.

The appeal was heard by HUNTER, C.J., IRVING, J., MARTIN, J.

A. H. MacNeill, for defendants.

Hamilton, K.C., for plaintiffs.

January 21, 1907.

HUNTER, C.J.:—A number of questions were submitted to the jury after hearing counsel, of which they answered only the following four, viz.:—

“5. Is the rocky bluff mentioned in the evidence within the right of way of the defendants? A.—Yes.

“6. If you find that the fire which was burning on the upper side of the track on August 23rd and 24th was set by locomotive No. 9, at what point did such fire commence? A.—On the rocky bluff.

“7. Was the fire on the St. Louis mineral claim set by sparks from the fire which originated near the railway? A.—Yes.

“8. Were the defendant company guilty of any negligence? If so, in what did such negligence consist? A.—Yes. In leaving inflammable material on the right of way.”

But they also found a general verdict for the plaintiffs for \$18,000.

The counsel for the appellants strenuously contended that the jury could not reasonably find that the fire which caused the damage originated from the fire which indisputably started on or near the right of way, but we were all of opinion at the hearing that the verdict could not be set aside on that ground, and it only remains to consider the other objections.

The first one was that the jury were wrong in finding that the rocky bluff on which the fire was started was within the right of way, and it was contended that, as the company had never filed any plans of their right of way either at Victoria or Ottawa, the right of way must be considered to be only the road bed itself. This, of course, would mean that the road bed would be of varying width, that it would be wider where there was an embankment than where it was on level ground, which would seem unreasonable, as it would not provide the necessary room or facilities to maintain the road bed or to make changes or repairs. Suppose, for instance, that it was found necessary to put a culvert under an embankment, would not the company be the first

to object if they were told to confine their operations within the "toe of the slope"? Again, it is obvious that it is expedient, especially in the case of mountain roads, to take the full statutory allowance, as it is often found necessary or advantageous to shift the road bed a few feet either way for the purpose of altering grades or curves, as well as to make provision for establishing turn-outs and switches as the traffic develops. Moreover, speaking generally, it is plain that the due protection and maintenance of the track would be practically impossible if the right of way were confined to the road bed itself, and it must also be plain that the obligation to fence would be made unnecessarily awkward unless a uniform width were taken. But there was some evidence that the company never considered that their right of way was limited to the road bed itself, as Morgan, the superintendent of both the Canadian and American portions of the system, admits that the American end of the right of way is 200 feet wide, where it turns through government land, and 100 where it has been purchased; and Renwick, P. L. S., says he surveyed the right of way in question, and that he marked out 100 feet on each side of the centre line, but he did not get his instructions from the defendant company. Suppose, however, we disregarded all this, then the company, who alone had knowledge of the matter, left the jury in the dark and put them in the dilemma of choosing between the proposition that the right of way was confined to the road bed, and the more reasonable one, having regard to the circumstances, that they had taken, or at all events had occupied, the full statutory allowance.

Then as to the jury's finding that the place where the fire started was within the right of way. There does not seem to have been the care taken in measuring the distance that there ought to have been, but one witness, Rolf, swears that he took the measurement of the place which Curry pointed out, and found it to be 53 feet 8 inches, following the slope of the ground from the track, by which it appears he meant the nearest rail, and gave it as his judgment that it was about 48 feet on the level.

He also took a line through three points on the edge of what appeared to be the cleared right of way, the two points furthest from each other being 456 feet apart, and the three points being respectively 52, 45 and 53 feet distant from the centre of the track, and found the place in question to fall between a line joining these three points and the track; and while, no doubt, more satisfactory measurements could have been made, still I cannot say that this evidence, coupled with the view, was not sufficient to enable the jury to find as they did.

It was also argued that there was misdirection, and, while certain passages of the charge might be open to objection if taken by themselves, it is familiar law that the Judge's charge is not to be minutely criticized, and that too much stress is not to be laid on isolated passages if the charge as a whole puts the case fairly before the jury. For instance, the learned Judge said:—

“You viewed that locality; it is for you to say whether (even disregarding all the evidence you heard) whether that fire had come over from the fire which had worked up from the Red Mountain railway, whether it could possibly or probably have leaped over and (did) come to the ground very near the St. Louis buildings. Whether the fire which burned all these limits was a continuation of that fire which started down there so small and innocently at the Red Mountain track. It is for you to say whether you can determine that for yourselves, regardless of what was said for or against. If you cannot decide from your own inspection, then you must call to your assistance the oral testimony, the evidence of those whom you have heard.”

But the very next sentence prevented the jury from getting a wrong notion of what he meant:—

“Do you believe that the evidence which you heard on behalf of the plaintiffs, with respect to that fire having jumped, is conclusive? Do you, on the other hand, believe the evidence of the defendants that it was a physical impossibility that that space could have been jumped, under the conditions of this draw, and

the high wind—a voluminous fire with a lot of material carried in the air. Applying your own common sense and experience and knowledge of fires, and what you have heard, and the conditions prevailing during a large conflagration, are you prepared to say that it was impossible that this Jumbo fire should have extended over and done the damage to the plaintiffs' timber?" etc.

Then it was urged that the learned Judge virtually assumed throughout his remarks that the rocky bluff was within the right of way, but I think it is evident that he used the term "right of way" as a convenient expression to describe the strip of land over which the company had been either exercising acts of ownership or availing themselves of their statutory powers in respect of clearing the timber, and it must be remembered that he was left in the dark just as much as the jury as to what was the real right of way. At any rate, in question 5 he left it explicitly to the jury to find as a fact whether or not the rocky bluff was within the right of way.

As to the objection that there was mis-direction, it is well settled that this is not a ground for a new trial unless it causes a verdict against the weight of evidence: See *Ford v. Lacey*, 30 L.J. Ex. 351; *Great Western R.W. Co. v. Braid*, 1 Moo. P.C. N.S. 101; *Alaska Packers' Association v. Spencer*, 35 S.C.R. 362; and the only non-direction specifically complained of is that the Judge should have charged that there was no evidence on which the jury could find that the rocky bluff was within the right of way, but, as we have just seen, he would not have been justified in charging to that effect.

It was also urged that under section 239 of the Railway Act the damages could not exceed \$5,000, but the finding that the defendants left inflammable material on the right of way disposes of this objection, as that is the limit where there is no negligence.

With certain exceptions, statutory and other, not necessary to notice here, the common law rule is that fire must be kept in by

him who uses it, and the railway company are freed from liability for damage arising from its escape only so far as the legislature has said so: See *Jones v. Festiniog R.W. Co.*, L.R. 3 Q.B. 733; *Power v. Fall*, 5 Q.B.D. 597; and liability for negligence is distinctly preserved by the section.

It was also argued that the section inferentially confines all liability for damage, whether it arises through negligence or not, to those cases where it occurs upon or along the route of the railway, and that, as the plaintiffs' property did not lie upon or along the route of the railway, but was three miles off, there was no liability, but I am clear that the section does not put any limit either as to amount or place when the action is founded on negligence. But supposing it did, and that no negligence was proved, and it was necessary to decide the question as to whether the plaintiffs' property lay along the route of the railway, I should say that it did. The word "along" does not mean only adjoining to or contiguous to, as does the word "alongside," but in the neighbourhood of, or near or close to, and I think that property within the range of mischief caused by the operation of the railway, was intended to come within the scope of this word; and I think that this view also gathers force from the fact that the expression used is not simply "along" but "upon or along."

It was also objected that the verdict was excessive, and the evidence of Hilligoss, a cruiser for the Great Northern Railway Company, was referred to, but he admits that the plaintiffs were in a much better position than himself to estimate the quantity destroyed, and I am unable to find any ground for saying that the amount assessed is unreasonable.

I think the appeal must be dismissed.

IRVING, J., concurred.

MARTIN, J.:—At the outset it is urged that there was no evidence to support the 5th finding of the jury, that the fire originated on the right of way. I think there was, but, in view of my opinion that there should be a new trial for mis-direction, I refrain, for obvious reasons, from here canvassing the evidence.

Misdirection is contended for on two heads, but the only one which it is necessary to consider is that regarding the extension of the fire from the right of way to the plaintiffs' property. The passage complained of is as follows:—

“You viewed that locality; it is for you to say whether (even) disregarding all the evidence you heard—whether that fire had come over from the fire which had worked up from the Red Mountain railway, whether it could possibly or probably have leaped over and did come to the ground very near the St. Louis buildings—whether the fire which burned all these limits was a continuation of that fire which started down there so small and innocently at the Red Mountain track. It is for you to say whether you can determine that for yourselves, regardless of what was said for or against. If you cannot decide from your own inspection, then you must call to your assistance the oral testimony, the evidence of those whom you have heard, that it was the same fire that started from the railway that destroyed Blue & Deschamps's timber? Do you believe that the evidence which you heard on behalf of the plaintiffs with respect to that fire having jumped is conclusive? Do you, on the other hand, believe the evidence of the defendants that it was a physical impossibility that that space could have been jumped, under the conditions of this draw, and the high wind; a voluminous fire with a lot of material carried in the air; applying your own common sense and experience and knowledge of fires, and what you have heard, and the conditions prevailing during a large conflagration, are you prepared to say that it was impossible that this Jumbo fire should have extended over and done the damage to the plaintiffs' timber? Does it appear to you impossible?”

It is urged that the fair construction of that language is that the jury could only understand that their duty was first to decide the question on the result of their own view, apart from any inspection, and in case they could not decide from their own inspection, then only were they entitled “to call to (their) assistance the oral testimony, the evidence of those whom (they) had

heard"; and that they must have received that definite impression despite the subsequent reference to "what you saw and . . . heard," which could only relate to their secondary state, i.e., failure to decide on the view merely.

This whole subject of the requirements of a charge was recently fully considered in the case of *Alaska Packers' Association v. Spencer*, 35 S.C.R. 362, affirming a decision of this Court, 10 B.C.R. 473, wherein it was held that the non-direction in that case was so defective as to amount to misdirection. In view of the said full consideration by both Courts, it would be superfluous, if not worse, for me to go over the ground again, and I shall content myself with saying that after applying the rules there laid down to this case, and giving every possible effect to the principle that "the whole of the summing up must be considered in order to determine whether it afforded a fair guide to the jury, and too much weight must not be allowed to isolated and detached expressions," (cited at page 372 from *Clarke v. Molyneux*, 3 Q.B.D. 237), I can only, with some reluctance, reach the same conclusion that was reached in that case, viz., that on a material point the "question left by the Judge to the jury was put in an inaccurate shape." The expressions here were far from being detached or isolated, but given directly on a main point on which the chief conflict of evidence occurred. As a matter of precaution, I note that the reference in the appeal book on page 385, line 9, to "part of the proof" being the view, is directed to another question, the width of the right of way. Such being the case, the situation is governed by the remarks of Lord Blackburn, cited at page 374 by Mr. Justice Killam, in *Prudential Assurance Co. v. Edmonds*, 2 App. Cas. 487: "When once it is established that a direction was not proper, either wrong in giving a wrong guide, or imperfect in not giving the right guide to the jury, when the facts were such as to make it the duty of the Judge to give a guide, we cannot inquire whether or no the verdict is right or wrong as having been against the weight of evidence or not, but there having been an improper direction there must be a *venire de novo*."

It is admitted that the defendants' counsel did not at the trial take any exception on this point to the charge, though he did on others. In such case, he could not have a new trial were it not for the new proviso in section 66 of the Supreme Court Act. That section was, as a matter of precaution, alternatively considered by me in *Alaska Packers' Association v. Spencer*, 10 B.C.R. at p. 490, though I was of the opinion, which was affirmed on appeal, that even under the old practice the charge could not stand. And it was also later considered, and its application restricted in certain circumstances, *i.e.*, by agreement, or course of conduct at the trial, by this Court in *Scott v. Fernie Lumber Co.*, 11 B.C.R. 97.

There is no doubt in my mind that the proviso applies to such a case as the present, and it comes to a question of costs of the abortive trial, for those of this appeal in such conditions are directed to be paid by the appellant. In the exercise of our discretion as to said costs, I think we should direct that they should be paid forthwith to the respondent after taxation.

So far as regards the view that was had herein, I do not wish to be understood as holding that the jury would not have been entitled in the circumstances to rely to a considerable extent thereon; they would have been, but not primarily and to the exclusion of other evidence. In this relation refer to *Jenkins v. Budding*, [1891] 1 Ch. 484, wherein as Lord Justice Kay says, the Court of Appeal considered a view to be "material" if not "essential," and I repeat what I recently said in this Court in *Star Mining and Milling Co. v. Byron N. White Co.*, on 15th November last, not yet reported, and in *Marshall v. Cates*, 10 B.C.R. 153. The case of *London General Omnibus Co. v. Lavell*, 17 Times L.R. 61, which was cited to the contrary, is very restricted in its application, for the trial Judge there acted on a view merely, without any evidence on the point at issue, *i.e.*, the misleading of the public by omnibuses resembling the plaintiffs. See note thereon in *Taylor on Evidence* (1906), vol. 2, p. 396; and indeed the whole chapter on "Evidence addressed to the senses" is instructive on the point.

The result is that the appeal should be allowed, the judgment set aside, and a new trial ordered, but the appellants must pay the costs above and below as hereinbefore mentioned.

NOTE.

This case is important as illustrating the liability of a railway company for fire where the damages are over \$5,000, and it can be shewn that the fire is due to the negligence of the railway company. Where these facts can be proved the liability depends upon principles which were in force prior to the Railway Act, 1903, section 239. These principles are fully discussed in Canadian Railway Act (Annotated); pages 458 to 466. Sec. 239 of the Act of 1903, is now secs. 297 and 298 of R.S.C. (1906) ch. 37.

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.

MANITOBA.]

[KING'S BENCH.

WALLMAN V. CANADIAN PACIFIC RAILWAY CO.

(16 Man. L.R. 82.)

Negligence—Contributory negligence—Death of person run over on railway track through negligence of crew of engine—Railway Act, 1903 (D.), sec. 224.

The plaintiff's husband, while in the actual discharge of his duty as section foreman on the defendants' railway examining the track, was struck by a yard engine running backwards. No lookout was on the tail board or rear of the engine and no signal of any kind was given to warn the deceased of the approach of the engine.

Held, that there was ample evidence to support the findings of the jury that the deceased came to his death in consequence of the negligence of the engine crew in neither blowing the whistle, ringing the bell nor keeping a proper lookout, and that the deceased could not, by the exercise of reasonable care under the circumstances, have avoided the accident, and that the appeal from the verdict in favour of the plaintiff should be dismissed.

Although the deceased, if he had looked round, would have seen the approaching engine and stepped out of the way, yet he was engaged at the time in the discharge of a duty of an absorbing character which would naturally take his whole attention and, under the circumstances, a jury might properly infer that there was no absence of reasonable care on the part of the deceased. Moreover, even if the deceased had been guilty of negligence, the defendants would still be liable if the engine crew could, by the exercise of reasonable care, have avoided the accident.

Coyle v. Great Northern R.W. Co. (1887), L.R. 20 Ir. 409; *The Bernina* (1887), 12 P.D. 89; *Kelly v. Union R.W. & T. Co.* (1888), 8 S.W.R. 20, *Canada Southern R.W. Co. v. Jackson* (1890), 17 S.C.R. 316; *London and Western Trusts Co. v. Lake Erie and Detroit River R.W. Co.* (1906), 12 O.L.R. 28, 7 O.W.R. 751, 5 Can. Ry. Cas. 364, followed.

The omission of a common law duty is actionable negligence equally with the omission of a statutory duty, and the common law requires the defendants' servants, when running through the yard, to take the obvious precaution of watching for workmen lawfully on the track and giving them timely warning: *Canada Atlantic R.W. Co. v. Henderson* (1899), 29 S.C.R. 632.

Held, also, that the jury would have been justified if they had drawn inferences unfavourable to the defence from the fact that neither the engineer nor the fireman who were in charge of the engine was called to give evidence for the defence: *Green v. Toronto R.W. Co.* (1895), 26 O.R. 326.

The accident occurred within twenty feet of a public highway crossing, but,

Quære, whether section 224 of the Railway Act, 1903 (D.), requiring that the whistle should be sounded when approaching a highway crossing and that the bell should be continuously rung until the highway is crossed, can be invoked on behalf of any persons except those using the highway crossing.

ARGUED: February 22, 1906.

DECIDED: May 7, 1906.

The plaintiff's husband was killed by a yard engine in the defendants' yard at Winnipeg on the 13th day of April, 1904. The action was tried before Mr. Justice Perdue and a jury at the fall assize in 1904, and resulted in a verdict of \$2,500 in the plaintiff's favour apportioned as follows: \$2,000 to the widow and \$500 to the deceased's daughter Augusta Charlotta Wallman.

From this verdict the defendant company appealed on several grounds, the chief ones being that there was no evidence that the defendant was negligent and that the deceased was guilty of contributory negligence.

J. A. M. Aikins, K.C., for defendants. This action was brought under the Workmen's Compensation for Injuries Act, R.S.M. 1902, sec. 78; sec. 3, sub-sec. (e) is the section under which the claim was made. The duty on an engineer of a switching engine was not proved. Plaintiffs must prove a duty and a breach of duty causing the accident before the right of action is complete. The provisions of section 224 of the Railway Act of 1903 are not intended, nor were they passed, for the benefit of an employee, but for the public. Where a statute is intended for one purpose it cannot be taken advantage of for a purpose not intended; in other words, the deceased could not claim protection against an omission which was not enacted for his benefit. See (1874) *Gorris v. Scott*, L.R. 9 Ex. 125; (1868) *Buxton v. North Eastern Railway Co.*, L.R. 3 Q.B. 549; *Vanderkar v. Rensselaer & Saratoga R.W. Co.*, 13 Barb. 390; (1878) *Ward v. Hobbs*, 4 App. Cas. 13. The object of this section was twofold, for the protection of the public crossing the highway and of the public travelling on the railway. A person has no right to

assume that there will be no negligence on the part of the defendants: see (1878) *Haldan v. Great Western R.W. Co.*, 30 U.C. C.P. 89. See judgment of Wilson, C.J., page 99 and (1900) *Young v. Owen Sound Dredge Co.*, 27 A.R. 649. The deceased was neglectful in standing or walking in an unsafe place when he might have been in a safe place. This principle is decided by (1900) *Phillips v. Grand Trunk R.W. Co.*, 1 O.L.R. 28, following *Callender v. Carlton Iron Co.*, 10 T.L.R. 366. There is no evidence to shew that the work deceased was doing required his presence between the tracks: (1906) *London & Western Trusts Co. v. Père Marquette*, 6 O.W.R. 321, 5 Can. Ry. Cas. 44. There was negligence in not looking and listening for the engine: (1865) *Stubley v. London & North Western R.W. Co.*, L.R. 1 Ex. 12; (1867) *Skelton v. London & North Western R.W. Co.*, L.R. 2 C.P. 631; (1883) *Davey v. London and Southwestern R.W. Co.*, 12 Q.B.D. 70. See particularly pp. 71, 72, 73-4; (1887) *Coyle v. Great Northern R.W. Co.*, L.R. 20 Ir. 409; (1890) *McAdoo v. Richmond and D.R. Co.*, 11 S.E.R. 316; (1895) *Southern R.W. Co. v. Smith*, 40 L.R.A. 746; (1899) *Danger v. London Street R.W. Co.*, 30 O.R. 493; (1902) *O'Hearn v. Port Arthur*, 4 O.L.R. 209. If there has been negligence on both sides, there is no right of action as there is then no actionable negligence on the defendants' part: (1884) *MacLaren v. Compagnie Francaise de Navigation*, 9 App. Cas. 640; (1888) *The Bernina*, 12 P.D. 58; (1886) *Ryan v. The Canada Southern R.W. Co.*, 10 O.R. 745. When the injury is caused through a mere accident, there is no right of action: (1898) *Burland v. Lee*, 28 S.C.R. 348. If the evidence of the action is conjectural, and there is nothing to shew how the accident happened, if the facts proved are as consistent with the supposition that due and reasonable care had been exercised as that there had been negligence, the plaintiff must fail: (1890) *Badgerow v. Grand Trunk R.W. Co.*, 19 O.R. 199; (1892) *Lydia Farmer v. Grand Trunk R.W. Co.*, 21 O.R. 299; (1896) *The Montreal Rolling Mills v. Corcoran*, 26 S.C.R. 595; (1898) *Canada Paint Co. v. Trainor*, 28 S.C.R. 352. It is an

established principle that a plaintiff can succeed in an action only *secundum allegata et probata*; here the facts before the accident are unknown: (1897) *Cowans v. Marshall*, 28 S.C.R. 161. The mere fact of an accident happening is not evidence of negligence: *Hammock v. White*, 11 C.B.N.S. 588; *Welfare v. London, Brighton and Southcoast R.W.*, L.R. 4 Q.B. 693; (1873) *Dube v. The Queen*, 29 C.L.J. 29. The burden of proof is on the plaintiff: *The Glendarroch*, 10 T.L.R. 269; (1893) *Dube v. The Queen*; *Young v. Owen Sound Dredge Co.*, cited *supra*; (1899) *Balfour v. Toronto R.W. Co.*, 2 Can. Ry. Cas. 314, 325, 5 O.L.R. 735; an unreported decision of Falconbridge, J., at *nisi prius*. For the doctrine of the last chance, or comparative negligence as it is called in the American text books: see *Smith v. Norfolk and Southern R.W. Co.*, 25 L.R.A. 287, and (1886) *The Bernina*, 12 P.D. 58.

A. B. Hudson and *T. H. Johnston* for plaintiff. It is argued that section 224 of the Railway Act is not for the benefit of employees. The section is wide enough to cover employees, and contains no internal evidence that it was intended for the protection of travellers on the highway only. The Railway Act contains no other provision (except section 228) for the protection of employees. It is most reasonable that warning should be given workmen working on the track: *MacMurchy & Denison*, Canadian Railway Act (Annotated) 439; *Abbott's Ry. Law*, 378; *Casey v. Canadian Pacific R.W. Co.*, 15 O.R. 574. The injury plaintiff sues for she claims was caused by negligence in fact, not merely the breach of statutory duty: *Gorris v. Scott*, L.R. 9 Ex. 125. It was for the jury to draw the inference as to how deceased was killed: *Brown v. Great Western R.W. Co.*, 1 T.L.R. 614. It was for the jury to say whether deceased was attending to his duty: *Can. Southern R.W. Co. v. Jackson*, 17 S.C.R. 316; *Barker v. London*, 8 T.L.R. 31; *Green v. Toronto R.W. Co.*, 26 O.R. 319; *Hamilton v. Moran*, 24 S.C.R. 717. The jury in answering the questions say that the cause of the accident was negligence of the engine crew: *Forward v. Toronto*, 22

O.R. 351. None of the engine crew were called by defendants, and for this reason jury were entitled to draw strong inferences as to their conduct. It is a common law duty of the company to be careful and to give warning to workmen of the approach of trains or engines: *Labatt on Master and Servant*, Vol. 1, p. 492, and cases there cited; *Mott v. Grand Trunk R.W. Co.*, 5 O.W.R. 42; *Hollinger v. St. Pierre*, 20 A.R. 244.

Aikins in reply. *Casey v. Canadian Pacific R.W. Co.*, 15 O.R. 574, does not support plaintiff's proposition, but it decides that the statutory obligation to ring the bell or sound the whistle only applies to a highway crossing, and not to an engine shunting on defendants' premises. An excuse for not having evidence will not supply the place of evidence itself: (1906) *The Kitty D. v. The King*, 26 C.L.T. 75. As to the word "control" see *McCord v. Cammell* (1896), A.C. at p. 57.

The judgment of the Court was delivered by

MATHERS, J.:—The questions submitted to the jury and their answers thereto were as follows:—

1. Was their negligence in the management of the defendants' engine? Answer.—Yes.

2. If so, what was the negligence? Answer.—That the whistle was not blown or the bell rung or proper lookout kept upon the track.

3. Could the deceased by exercise of reasonable care under the circumstances have avoided the accident? Answer.—No.

4. What was the actual cause of the accident? Answer.—Neglect of duty on the part of the engine crew.

In addition they were asked and found the damages as above stated. The question to be decided is, was there any evidence to support the above findings?

The deceased was at the time of his death employed by the defendant as section foreman. The accident occurred from fifteen to twenty feet west of McPhillips Street, a public highway

crossing the Winnipeg yards. When last seen prior to the accident, he was a short distance east of McPhillips Street, and was then walking westward on the lead track. As stated by Barry, the roadmaster who saw him: "He was walking over and examining the section, examining the tracks. He walks over the section to examine the track to see that it is in perfect line and gauge, and that it is perfectly spiked and is safe for traffic. If he was going over a part of the track that needed special attention, the lead track or main line, he would have to examine that carefully. In such case it would not be sufficient to walk along one side, he would very often have to get down and examine defective rails or frogs." When the accident occurred the deceased was between the rails on the lead track and close to a frog. He was then struck by a yard engine running backward and hauling a stock car. No lookout was on the tail board or rear of the engine, and no signal of any kind was given when approaching or crossing McPhillips Street. Two members of the deceased's crew were working from 150 to 200 feet from the accident and heard no such signal. One of them says that if any signal had been given he would have heard it. The other was not asked the question. No one actually saw the engine strike the deceased, but one of these workmen, Cedarstraud, saw him in the act of falling, and before he had reached the ground. The foot board of the engine tender was then in contact with him. The day was clear, the deceased was in possession of all his faculties, and the lead track on which he was walking could be seen for a considerable distance.

It was contended on behalf of the plaintiff that the failure to sound the whistle when approaching McPhillips Street, and to continuously ring the bell until across that thoroughfare, as required by section 224 of the Railway Act, was negligence on the defendants' part. I entertain considerable doubt as to whether that section can be invoked on the plaintiff's behalf. It seems to me it was enacted for the benefit of those using the highway crossing, and not for the benefit of those otherwise upon the

railway, and that, as the failure to comply with that section involved no breach of duty of which the deceased had a right to complain, it was not negligence of which he could take advantage. As I think, however, that this case can be disposed of on other grounds, I desire to leave this an open question.

Apart from the statute, did the defendants owe any duty to the deceased to keep a lookout upon the track and give him warning of the engine's approach? The deceased was engaged in the discharge of his duty. He had arrived at a point where it was his duty to be specially careful to see that the track was in good repair. Those in charge of the engine must be taken to have known that it was the deceased's duty to walk the track and observe its condition as he went along. They must have known that, in doing so, he was liable to become so absorbed in his work as to be oblivious to the approach of a yard engine unless warning were given. A large number of men are employed in the yards whose duty must frequently require them to be upon the tracks. A locomotive when in motion is a dangerous machine, and those in charge of it ought to keep a constant lookout when running through a yard where they know other employees are working. There is some evidence that it was the duty of those in charge of these engines to do so; but, apart altogether from such evidence, I think the common law imposes such a duty upon the engine crew and that their failure to discharge it was negligence fit for the consideration of the jury.

But it is said the deceased was guilty of contributory negligence. There is no doubt that had he looked around he could have seen the engine approaching and could easily have stepped out of the way. He knew the danger, and that it was no doubt his duty to use his eyes and his ears for his own protection. That proposition is fully established by such cases as *O'Hearn v. Port Arthur*, 4 O.L.R. 209; *Danger v. London Street R.W. Co.*, 30 O.R. 497, and *Davey v. London & South-Western R.W. Co.*, 11 Q.B.D. 213, 12 Q.B.D. 70. Had he been simply walking along the track, without at the same time being engaged in inspecting in

the manner before stated, I would have no hesitation with the authorities in holding that he had been negligent and that such negligence was a contributing cause of the accident. The deceased was, however, engaged in the discharge of a duty of an absorbing character which for the time being would take his whole attention, and I cannot see why under all the circumstances a jury might not properly infer that there was no absence of reasonable care on the part of the deceased.

But, even if the deceased had been guilty of negligence, the defendants would still be liable if the engine crew could by the exercise of reasonable care have avoided the accident. In *Coyle v. Great Northern R.W. Co.*, L.R. 20 Ir. 409, Dallas, C.B., at p. 418, says that, to justify the Judge in leaving the case to the jury notwithstanding the negligence of the plaintiff, "the circumstances must be such as to render reasonable an inference of fact that the defendants by using due care could have obviated the consequence of the plaintiff's negligence." In *The Bernina*, 12 P.D. at p. 89, Lindley, L.C., divides the cases which give rise to actions for negligence into three classes, the third of which he states as follows: "A. is injured by B. by the fault more or less of both combined, then the following further distinctions have to be made: (a) if, notwithstanding B.'s negligence, A. with reasonable care could have avoided the injury he cannot sue B. . . (b) if, notwithstanding A.'s negligence, B. with reasonable care could have avoided injuring A., A. can sue B." The same law prevails in the United States. In *Kelly v. Union R.W. Co. & T. Co.*, 8 S.W.R. 20, it is held that when a plaintiff is guilty of contributory negligence the defendant is nevertheless liable if by the exercise of ordinary care the accident could have been prevented. "The above rule," the Court said, "is based upon the recognition of the fact that a locomotive is an instrument of danger when in motion and those in charge ought to keep a constant lookout upon the track; that this is a constant and continuing duty of an imperative character and, if a discharge of this duty would have prevented the injury to a person negligently on the track, the company is liable."

Can it for a moment be imagined that, if a proper lookout had been kept by the engine crew and warning given of their approach, any accident would have happened? But it is argued that no such duty is imposed by statute and therefore it is not a duty. The omission of a common law duty is negligence equally with the omission of a statutory duty. "Irrespective of statute, the starting and running of a switch engine in a switch yard filled with a network of tracks, upon which cars and engines are constantly moving and in which yard men are constantly at work, without the ringing of a bell or blowing a whistle is evidence of negligence": *Union Pacific R.W. Co. v. Elliott*, 74 N.W.R. 627; Thompson on Negligence, par. 4478, 4489.

In *Canada Atlantic R.W. Co. v. Henderson*, 29 S.C.R. 632, Gwynne, J., says:—

"On the case found by the jury, I am of opinion that, if ringing the bell would prevent an accident to a person crossing the highway, there is an obligation at common law to ring it and it is negligence not to do so."

I am, therefore, of opinion that, apart altogether from the requirements of the statute, the common law required the defendant's servants when running through the yards to take the obvious precaution of watching for workmen lawfully on the track and giving them timely warning and that had they done so there would have been no accident. The jury have found that the cause of the accident was neglect of duty on the part of the engine crew and I think the finding was fully justified.

It was argued on behalf of the appellant that there was no evidence to shew how the accident happened; that it is a matter of mere conjecture only.

I cannot accede to this argument. The deceased was seen a short time before walking the track in discharge of his duty. He is next seen in the act of falling as the engine came in contact with him. These are facts from which the cause of the accident might be reasonably inferred. The cases cited by the defendants' counsel are entirely different. In *Young v. Owen Sound Dredge*

Co., 27 A.R. 649, the fireman for whose death the action was brought was first seen in the water some distance behind the tug on which he had been employed. The negligence charged was that the passage way along each side of the engine room was filled with wood over which a person would have to pass in going from one end of the tug to the other. But there was no evidence to shew where the deceased fell from or in any way connect the accident with the negligence charged. *Montreal Rolling Mills v. Corcoran*, 26 S.C.R. 595; *Canadian Coloured Cotton Mills Co. v. Kervin*, 29 S.C.R. 478; *Callender v. Carleton Iron Co.*, 9 T.L.R. 646, 10 T.L.R. 366; *Cowans v. Marshall*, 28 S.C.R. 161; *Badgerow v. G.T. R.W. Co.*, 19 O.R. 191, and *Farmer v. G.T. R.W. Co.*, 21 O.R. 299, may all be distinguished in the same way. In none of these cases was there an eye witness of the accident. In all of them the evidence left it largely a matter of conjecture as to the cause of the accident.

The case of *Canada Southern R.W. Co. v. Jackson*, 17 S.C.R. 316, is in some respects not unlike the present case. There a switch tender in the employ of the company was obliged in the ordinary discharge of his duty to go to a switch in the station yards, and he walked along the ends of the ties outside the rails. While doing so an engine came behind him without giving warning and knocked him down. A verdict for the plaintiff was sustained on the jury's finding that the plaintiff could not by the exercise of reasonable care have avoided the accident. Ritchie, C.J., says at page 322: "Had the bell been rung, as it was admitted at the trial it was the duty of the servants of the company to have the bell rung while the engine is passing through the yard, it is difficult to conceive that the accident would have happened."

In *London & Western Trust Co. v. Lake Erie & Detroit River R.W. Co.*, 12 O.L.R. 28, 5 Can. Ry. Cas. 364, a yard master in the discharge of his duty was in the act of passing around the end of some cars standing in the yard in order to inspect the other side, when a couple of loaded cars came down the switch

and violently collided with the standing cars and the yardmaster was knocked down and killed. Meredith, J., at the trial nonsuited the plaintiff, after taking the jury's verdict in favour of the plaintiff, on the ground that the deceased should have looked before attempting to cross behind the cars, and, had he done so, he would have seen the approaching loaded cars. The Court of Appeal unanimously reversed this judgment, holding that the jury were justified in finding that there was no want of reasonable care on the part of the deceased.

From the fact that neither the engineer nor fireman who were in charge of the engine were called by the defendant to give an account of the accident, the jury may have drawn inferences unfavourable to the defendant and I cannot say they were not justified in doing so. In *Green v. Toronto R.W. Co.*, 26 O.R. 326, the motorman in charge of the car causing the accident was not called as a witness by the defendants. In giving judgment, dismissing an appeal to the Divisional Court from a verdict in favour of the plaintiff, Meredith, J., thus comments upon this circumstance: "No excuse was offered for not giving warning; if the driver had any excuse to offer he ought to have been called as a witness for the defence. The jury might not unfairly infer a good deal from the fact that he was not called to give his account of the accident, to state why he gave no warning to a man, who, according to the testimony given at the trial, was rightly employed in sweeping the street . . . and properly performing his work and naturally looking down at it."

On the question of the amount of the verdict or its apportionment I see no reason for interfering with the conclusion arrived at by the jury.

In my opinion the appeal should be dismissed with costs.

Appeal dismissed with costs.

[ONTARIO.]

[COURT OF APPEAL.]

HANLY ET AL. V. MICHIGAN CENTRAL R.W. CO.

(13 O.L.R. 560).

Railway—Injury to Person at Highway Crossing—Negligence—Findings of Jury—Train “behind Time”—Dominion Railway Act, 1903, sec. 215.

In an action to recover damages for the death of a man who was struck by a train of the defendants at a highway crossing, the evidence as to whether the statutory signals were given was conflicting, and, while it was shewn that the train was about ten minutes late, there was no evidence as to the cause of the delay, nor was it shewn that the deceased was misled thereby. The jury found that the defendants were guilty of negligence, which consisted in the train being “behind time;” but they did not answer a question put to them as to whether the bell was ringing:—

Held, that no actionable negligence was shewn or found, and the action should be dismissed; it was not a case for a new trial.

Section 215 of the Dominion Railway Act, 1903, which requires that all regular trains shall be started as nearly as practicable at regular hours, fixed by public notice, did not aid the plaintiffs.

Judgment of Boyd, C., reversed.

AN appeal by the defendants from the judgment of Boyd, C., at the trial, upon the findings of a jury, in favour of the plaintiffs.

The action was brought by Maria Hanly, the widow, and Lorena Hanly and others, the infant children, of James Hanly, deceased, by the said Maria Hanly, their next friend, and by the latter as administratrix of the estate of James Hanly, to recover damages for his death by the alleged negligence of the defendants, and also the value of a pair of horses and a waggon killed and destroyed at the time of the injury which caused the death.

The plaintiffs, by the statement of claim, alleged: (2) that on or about the 9th March, 1905, James Hanly was driving with his team and lumber waggon along a public highway in the township of Sandwich South, in the county of Essex, known as the Fifth Concession road in the said township, and being his usual route in going to and returning from the city of Windsor to his then home on the south-west quarter of lot 14 in the 6th concession of the said township, and in so driving on and along said highway he was obliged, in the performance of his ordinary work and business affairs, to cross the defendants' line of railway, at its junction with

the said highway, and in crossing the said line of railway he and horses and waggon were struck by a locomotive engine of the defendants, which was passing and being operated by them on the railway; (3) that by reason of the construction of the defendants' line of railway at the point or crossing in question, it is a dangerous crossing and a place where accidents are likely to happen, and it was impossible for the deceased to hear and get a view of the engine or to avoid it, in the circumstances, as it was approaching the crossing going west, and by reason of the darkness of the night in question and of the running of the engine at too high or fast a rate of speed, in order to make up time, being then running behind its schedule time, and by reason of the passing at the said crossing of another locomotive engine and train of cars, going east, a few minutes before, and by reason of the negligence of the defendants' employees in control of the locomotive engine in omitting to ring the bell or blow the whistle on the engine as it was approaching the crossing, the deceased drove on to the track of the defendants' railway, when he was struck by the locomotive engine, and was so hurt and injured that he died a few hours thereafter, and the horses, harness, and waggon of the deceased were killed and destroyed, by reason of all of which the plaintiffs had sustained damages.

The defendants pleaded "not guilty by statute," referring to 31 Vict. ch. 14, secs. 1, 2, 3, 17 (O.); 37 Vict. ch. 68, secs. 1, 2, 3 (D.); 57 & 58 Vict. ch. 66, sec. 1 (D.); 3 Edw. VII. ch. 58, secs. 1, 2, 3, 6, 118, 120, 242 (D.)

The questions submitted to the jury and their answers were as follows:—

Q. 1. Was Hanly killed as the result of his own carelessness?

A. No.

Q. 2. Was he killed by the negligence of the railway? A. Yes.

Q. 3. If so, what was the negligence? A. Behind time.

Q. 4. Could Hanly, by the exercise of reasonable care, have avoided being killed by the train? A. No; because his attention would naturally be on the east-bound train, being the west-bound train was past due.

Q. 5. Do you find the bell was ringing continuously, as the defendants' witnesses say? (Not answered.)

Q. 6. If you think damages should be paid by the railway, how much? A. \$3,950.

Judgment was entered for the plaintiffs for that amount, with costs.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A., on the 22nd and 23rd January, 1907.

I. F. Hellmuth, K.C., and *E. C. Cattnach*, for the defendants, appellants. There was no evidence upon which a jury could have properly found that there was any neglect of duty on the part of the defendants, and the defendants' motion for a nonsuit should have been granted. Even assuming negligence on the part of the defendants, the evidence shews that the injury was caused solely by the negligence of the deceased, and no amount of care on the part of the defendants could have prevented the accident. The answers of the jury disclose no negligence on the part of the defendants, and are insufficient in themselves to warrant a judgment against the defendants. The absence of a finding in answer to the question as to the bell being kept ringing is equivalent to a finding in the defendants' favour: *Andreas v. Canadian Pacific R.W. Co.* (1905), 37 S.C.R. 1. There is no negligence in being behind time. The damages were excessive. No evidence was given by the plaintiffs of the income or earning power of the deceased, or of any pecuniary damages sustained by them in consequence of the death. See *Jennings v. Grand Trunk R.W. Co.* (1888), 13 App. Cas. 800.

S. White and *E. Meek*, for the plaintiffs, respondents. The evidence shews that the defendants were wholly to blame for the death, and the answers of the jury, when all read together, are sufficient to warrant the judgment. The jury have found negligence, and, as the evidence shews that the crossing was a dangerous one, and the train was going at a high speed, it must be taken that the jury meant that it was negligent to run in that way, when behind time, in passing a dangerous crossing. *Misener v. Wabash R.W. Co.* (1906), 12 O.L.R. 71, affirmed by the Supreme Court of

Canada, is very like this case; see also *Johnson v. Grand Trunk R.W. Co.* (1894), 21 A. R. 408; *Vallee v. Grand Trunk R.W. Co.* (1901), 1 O.L.R. 224; *Beckett v. Grand Trunk R.W. Co.* (1886), 13 A.R. 174; *Hollinger v. Canadian Pacific R.W. Co.* (1892), 21 O.R. 705. By sec. 215 of the Dominion Railway Act, 1903, trains shall be run at regular hours fixed by public notice. The time-table is the notice. It is for the defendants to explain the delay. See also secs. 213 and 224 of the Act. Even if the precautions prescribed by the Act are observed, extra precautions should be taken at a dangerous crossing with a late train : *Lake Erie and Detroit River R.W. Co. v. Barclay* (1900), 30 S.C.R. 360; *Canadian Pacific R.W. Co. v. Fleming* (1893), 22 S.C.R. 33; *Peart v. Grand Trunk R.W. Co.* (1886), 10 O.L.R. 753 (Appendix); *Grand Trunk R.W. Co. v. Hainer* (1905), 36 S.C.R. 180. The amount of the verdict is reasonable: see *Schwoob v. Michigan Central R.W. Co.* (1906), ante 548. There is no reason why the judgment should be disturbed, but if it is there should be a new trial.

Hellmuth, in reply. As to extra precautions, see *Grand Trunk R.W. Co. v. McKay* (1903), 34 S. C. R. 81.

January 28, 1907. OSLER, J.A.:—The negligence charged in the statement of claim is that the defendants' servants in charge of the train which killed the plaintiff Maria Hanly's husband and his horses, omitted to give the statutory warnings before coming to the crossing where the collision took place. It is also alleged, though not charged as negligence, that the engine "was running at too fast or too high a rate of speed in order to make up time, being then running behind its schedule time."

As to the omission to ring the bell or blow the whistle, while the evidence was conflicting, the weight of it was entirely in the defendants' favour. As to the rate of speed and the train being behind time at the crossing in question, it was shewn that the rate was the usual one, and that the train was about ten minutes behind time. The jury did not answer the questions put to them as to the former, but, in answer to other questions, found that the deceased was killed by the negligence of the railway company, and

that (such negligence consisted in the train being) "behind time." They assessed the damages at \$3,950. There was evidence that the team of horses killed by the collision was worth \$300, but there was no direct evidence of any pecuniary loss to the plaintiffs beyond the facts that the deceased was a man of about 45 years of age and a farmer, nor does it appear how much was allowed for the horses and how much in respect of the other cause of action.

It appears to me, upon the whole case, that the appeal must be allowed, on the ground that no actionable negligence has been found by the jury. Section 215 of the Railway Act, 3 Edw. VII. ch. 58 (D.), requires that all regular trains shall be started and run as nearly as practicable at regular hours, fixed by public notice. This provision was probably enacted in the interest of passengers or persons using the railway, and not of persons using the highways crossed by the railway, who are supposed to be sufficiently protected by the statutory warnings required to be given of the approach of the train. But, even if the latter may invoke the section, much more would be necessary to prove negligence than the mere fact that the train was late and did not pass the given point at the scheduled time. No doubt, if it had done so, the deceased would not have been there, and the accident would not have happened. But the regularity to be observed is only that which is from time to time practicable under all the circumstances, and, if the section is applicable at all in such an action as the present, it would certainly have to be proved, in order to fasten upon the defendants liability for negligence, not only that the delay was a negligent delay, but also that the deceased had in some way been misled by the defendants into supposing that no train was coming, and, therefore, "might go over the crossing in safety without taking the precaution of looking up and down the line or any other such precaution as might be otherwise necessary." *Smith v. South Eastern R.W. Co.*, [1896] 1 Q.B. 178. There is an entire absence of any evidence of this kind, and, therefore, the action fails, on the plain ground that the plaintiff has not proved that the negligence of the defendants caused the death of the deceased.

The evidence of failure to give either of the statutory warnings was conflicting, and the weight of evidence is against the plaintiff's contention on that point—a fact which quite accounts for the omission of the jury to answer the question by which their attention was specially directed to it as the ground of negligence prominently put forward and mainly relied upon at the trial. If we could see that the consideration of this had been merely overlooked by the jury, we might think it right to direct a new trial, as was done in the case of *Cobban v. Canadian Pacific R.W. Co.* (1896), 23 A.R. 115. But I can see nothing in the case which would justify this course in being taken.

There are many other difficulties in the plaintiffs' way, which would have made a new trial necessary, even if the answers of the jury had disclosed a finding of actionable negligence, but these it is not necessary to deal with, as the action must be dismissed on the ground already mentioned.

Appeal allowed, and action dismissed, with costs if demanded.

MOSS, C.J.O., GARROW and MACLAREN, JJ.A., concurred.

MEREDITH, J.A.:—It seems extraordinary, to me, that it could be seriously contended that any judgment for the plaintiffs can be supported on the findings of the jury in this case.

The findings are, that Hanly was killed "by the negligence of the railway" in being "behind time." Hanly was killed by a passing train at a level crossing of the railway on a public highway in the country, miles away from any station. It is surely almost farcical to assert, in these circumstances, that any actionable negligence on the part of the defendants was the proximate cause of his death. There was no time fixed at which this or any other train should pass over this, or any other, highway. Times are fixed, by public notice, for the departure of certain trains from certain stations, and sometimes for their arrival at certain stations. The most that can be said of the train in question is that it would probably have been a few minutes late upon its arrival at its next stopping place—Windsor; so that the contention for the plaintiffs

amounts to this, that the defendants are liable in this action because the train in question might have been, and probably would have been, a very few minutes late in arriving at Windsor. A train may leave one stopping place at the moment of its fixed time, it may before crossing any highway be unavoidably, or negligently, delayed many minutes, and yet may arrive at and depart from its next stopping place at the fixed time to the moment. There is not a particle of evidence that any delay of the train was caused by any sort of negligence on the part of the defendants or any of their servants; on the contrary, the evidence shews that the crew of the train were doing all that could be done to arrive at and depart from Windsor in time. So that the contention comes to this, that every train, having fixed regular hours of starting and running, must be treated as an unlawful thing, a trespasser, in crossing highways, while running between stations, unable, or unlikely, to reach the next stopping place in time, no matter what may be the cause of its being late.

The defendants owed no duty to Hanly to cross the highway in question at any particular second, minute, or hour with this particular train, or any other; and the fact that it did not pass at such a second, minute, or hour, was not the proximate cause of his death. If it had passed a minute before or a minute later, and if he had not been upon the track then, he would not have been killed by that particular train; but he might have been killed by some other train, upon the same railway, at the same place; they were passing frequently throughout the day and the night. If he had not been out so late that night; if he had not lived in a place which necessitated his crossing the track; and, indeed, if he had not been born, the accident would not have happened; but these things are all alike more or less remote from the proximate cause of the accident, though without them, and hundreds others, it could not have happened. A *sine quâ non* may be very far removed from the cause of an accident.

Section 215 of the Railway Act, 1903, affords the plaintiffs no aid. It is in these words: "All regular trains shall be started and run, as near as practicable, at regular hours, fixed by public notice,"

and is not a new enactment. Whatever may be its effect in regard to persons more or less directly concerned in, and affected by, the regular arrival and departure of trains, it creates no duty on the part of a railway company towards persons merely crossing its railway, upon a highway: see *Philadelphia, etc., R. Co. v. Spearen* (1864), 47 Penn. St. 300, and *East Tennessee, etc., R. Co. v. Winters* (1886), 85 Tenn. 240. But, if it did create any such duty, there is no sort of evidence that its provisions were not complied with. It can hardly be said that a train which may be a few minutes late after a run of about 200 miles, and possibly 600 miles, is not running at regular hours; it may very well have left Windsor in time to a moment; and there was no attempt made to shew that it was not so running "as far as practicable." There would be no great cause for complaint if all trains were as punctual. And, in addition to all this, if the train had been keeping ever so irregular hours, that would not have been the proximate cause of the accident.

It is obvious that the fact of a train arriving, or passing, at an unusual and unexpected time, may be more or less material on a question of contributory negligence; but it is more obvious that it could not in such a case as this create a cause of action such as this.

But it was said that there should be a new trial because the question as to the ringing of the bell was not answered by the jury. Nothing was said at the trial as to that. If an answer should have been given, then was the time to raise the question, for then the jury could have been required to answer. The question, however, ought not to have been asked; and was, not improperly, left unanswered. Asking it was but repeating a question already asked, or, rather, one which must be covered, so far as material to the rights of the parties, in the answers to questions already asked. If the jury found negligence in regard to the statutory requirement as to ringing the bell, and also found that that negligence was the cause of the accident, they would have said so in answer to the second and third questions. The jury's attention was, of course, pointedly called to this ground of negligence during the trial and in the Judge's charge. It was, therefore, superfluous,

and apt to be embarrassing. It was also useless without the complementary question, was such negligence the proximate cause of the accident? and also, in a sense, incomplete, as it did not include the sounding of the whistle. If the question had been answered in the negative, that would have availed the plaintiffs nothing, for the earlier answer shewed that that negligence was not, but that something else was, the proximate cause of the accident. The jury seem to have taken an intelligent view of the matter, and having, by their findings and answers as to the earlier questions, made that question immaterial, very properly abstained from answering it; and in that the learned trial Judge seems to have agreed with them, for otherwise he would have required them to answer the question: see *Schwob v. Michigan Central R.W. Co.*, ante 548, and *Wilson v. Hamilton Steel and Iron Co.* (1906), not yet reported.*

Again, an appeal was made to the discretion of the Court to grant a new trial. That is a power which certainly exists, but, it is equally certain, is one which can but very seldom be properly exercised. The cases are few indeed which are not within the rule that a verdict once found ought to stand. What reason can there be for seeking it? Only one: that a new jury, finding that "behind time" will not support a judgment in the plaintiffs' favour, may find that the bell did not ring or that the whistle did not sound, and that such neglect was the proximate cause of the accident; and so, and for such purpose, reverse the findings of the jury now in question. That cannot be in the interests of justice. If it appeared that the plaintiffs have a good cause of action, which has failed through some mistake, a new trial might well be granted; but the weight of the evidence is very much against their claim, and so to give them another chance, after the education which the trial had, and this appeal, affords them, would be manifestly unjust to the defendants, who have fairly succeeded, and are entitled to the judgment.

*Reported 8 O.W.R. 525.

Ontario.]

[Court of Appeal.

PRESTON V. TORONTO RAILWAY COMPANY.

(13 O.L.R. 369).

Negligence—Street Railway—Piling Snow at Side of Track—Contributory Negligence—Plaintiff Putting Himself in Peril.

An appeal by defendants from the judgment of the Divisional Court, reported 11 O.L.R. 56; 5 Can. Ry. Cas. 30, was dismissed: MEREDITH, J.A., dissenting.

THIS was an appeal by the defendants from the judgment of a Divisional Court reported 11 O.L.R. 56; 5 Can. Ry. Cas. 30.

The appeal was argued on the 25th and 26th of April, 1906, before MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

Wallace Nesbitt K.C., and D. L. McCarthy, for the appeal. There was no evidence of the rapid rate of the approaching car as mentioned in the judgment of the Court below, nor that the gong was not rung even if the plaintiff did not hear it, and the case should not be left to a jury to draw inferences as to what he might have done if he had heard it: *Ellis v. The Great Western R.W. Co.* (1874), L.R. 9 C.P. 551; *Skellon v. London and North-Western R.W. Co.* (1867), L.R. 2 C.P. 631, at p. 636, per Willes, J. The plaintiff's conduct was reckless: *Siner v. The Great Western R.W. Co.* (1869), L.R. 4 Ex. 117; *Callendar v. Carleton Iron Co., Ltd.* (1903), 9 Times L.R. 646; *The Dominion Iron and Steel Co. v. Oliver* (1904), 35 S.C.R. 517; *O'Hearn v. Town of Port Arthur* (1902), 4 O.L.R. 209; *Phillips v. The Grand Trunk Railway of Canada* (1900), 1 O.L.R. 28; *Danger v. London Street R.W. Co.* (1899), 30 O.R. 493. The defendants were not negligent. We also refer to *Hiddle v. National Fire and Marine Ins. Co. of New Zealand*, [1896] A.C. 375; *Ibo Syndicate, Ltd., v. Wyler* (1902), 87 L.T.N.S. 83; *Follett v. Toronto Street Railway Company* (1888), 15 A.R. 346, per Hagarty, C.J.O.; *Landrigan v. The Brooklyn Heights Railroad Co.* (1897), 23 App. Div. Sup. Ct. N. Y. (Hun) 43; *Metcalf v. St. Paul City Ry. Co.* (1900), 84 N.W.R. 633, at p. 634.

Shirley Denison, contra. The plaintiff had the right to ride on the track, which should have been clear, but the defendants had banked it up with snow and so created the situation of danger. One track was no safer than the other, so he did not leave a place of safety and go into a place of danger. The motorman was inexperienced. If anything was omitted which should have been done and might have contributed to the accident, the case should have gone to the jury. There was too much speed and no warning. I refer to *Daldry v. Toronto R.W. Co.* (1905), 6 O.W.R. 62; *Wanless v. The North Eastern R.W. Co.* (1871), L.R. 6 Q.B. 481; (1874), 7 H.L. 12; *Smith v. Niagara and St. Catharines Railway Company* (1904), 9 O.L.R. 158.

Nesbitt, in reply.

November 3, 1906. Moss, C.J.O.:—In my opinion this appeal fails and should be dismissed.

The plaintiff was lawfully using the part of the highway on which he was proceeding following the south-bound car down Yonge street towards his destination. He was also entitled to use the part of the highway between the tracks on the east side provided he did not unnecessarily interfere with the traffic upon that part or knowingly or recklessly expose himself to imminent and apparent danger by going upon it.

According to the evidence, he was following the south-bound car, keeping at a distance of fifteen or twenty feet behind it, until it came to a stand-still on the north side of Wellington street. As it did not move on by the time he had arrived at a distance of about four feet from it, it became necessary for him to avoid it by turning either to the right or left. His way to the right was obstructed by a ridge of snow at the west side of the track about eight or ten inches in height. Deeming it impossible to force his bicycle over this obstruction, he looked to the left or east side of the car. He saw nothing and heard no sound to indicate that there was any approaching car or other traffic to obstruct his way on the east track, and he turned to go upon it. As a matter of fact there was a car crossing Wellington street from the south going at a

rapid pace, and it was within ten feet of him when he came on the devil strip. He made an effort to avoid a collision by turning straight across the track and throwing himself off, but failed and was struck and injured.

The learned Chancellor, before whom the case was tried, did not deal with the question whether there was evidence to submit to the jury of negligence on the part of the defendants, except on one point, to be noticed presently, but held that the plaintiff should not have turned in upon the east track, but should have turned to the right, and because he did not do so, he was guilty of negligence which occasioned the injury; in short, that the plaintiff was the author of his own injury.

He was also of opinion that there was no obligation on the part of the defendants or their motorman to sound the gong when crossing the street or approaching another car and that failure to do so was not negligence. But in this he overlooked the testimony of the defendants' road-master, that there is a rule requiring the ringing of the gong when passing cars. The omission to give the customary signal was a factor in support of the charge of negligence, which should not have been withdrawn from the jury: *per* Hagarty, C.J., in *Beckett v. The Grand Trunk R.W. Co.* (1886), 13 A.R. 174, at p. 183. There was, in my opinion, evidence upon which the jury might reasonably find that the gong was not sounded and that the car was moving at a rapid rate.

Then the question whether the plaintiff had acted reasonably under the circumstances, or whether he had by his own negligence and want of proper care and caution either brought the accident upon himself or contributed to it, was for the jury.

I am not prepared to hold, nor do I think the authorities compel me to hold, that it is *per se* negligent, reckless or unreasonable conduct for the rider of a bicycle, riding between the rails of one track of the railway to turn upon the space between the rails of the other track when he finds his way on the first obstructed. It must be for a jury to decide whether under all the circumstances he acted in a reasonable manner in so doing. And in my judgment

the view taken by the Divisional Court was right and should be affirmed.

Appeal dismissed with costs.

OSLER, J.A.:—The judgment of the Divisional Court directing a new trial, must, I think, be affirmed.

There is evidence that the driver of the north-bound car did not sound his gong when about to pass the stationary south-bound car behind which the plaintiff was riding.

The latter does not say that he was listening for a gong. He says he did not hear one. He admits, in answer to a question so framed, that it was possible that a gong might have been rung and that in his excitement he did not hear it, but he says, nevertheless, that he is pretty sure that it did not ring. And he is shewn to have been in such a situation—so close behind the standing car—that he would probably have heard it if it had been rung: *The Directors, etc., of the Dublin, Wicklow and Wexford R.W. Co. v. Slattery* (1878), 3 App. Cas. 1135, at p. 1183; and *Basso v. Grand Trunk R.W. Co.*, recently decided in this court: 6 O.W.R., p. 893.

Upon the question of fact, therefore, there is evidence from which the jury might infer that the warning was not given, and if so, they might also infer negligence on the defendants' part in omitting a precaution, of which their own rule affirms the necessity, at a situation specially dangerous for persons desirous of passing behind a standing car to the further track or to the other side of the street, the view of which is obstructed by the car. The case differs from *Skelton v. London and North Western R.W. Co.*, L.R. 2 C.P. 631, where a precaution generally, but not always, observed by the defendants at a certain railway crossing, and the omission of which on the particular occasion was relied upon as evidence of negligence, was not only wholly voluntary, but the crossing was one at which there was no unusual danger and there was nothing to oblige the defendants to take extra precautions.

The other question in the case, viz., whether the plaintiff was guilty of contributory negligence which really caused his injury, is perhaps more arguable, but on the whole I am of opinion that

this also was a question which could not properly have been withdrawn from the jury. The plaintiff was lawfully using the highway when he followed the car on the track along which it was going and on which it came to a stand-still a short distance from him. It is true the accident happened in broad daylight, but the plaintiff's view of the north-bound car was then obstructed by the other car. There was a substantial difficulty caused by the snow bank in the way of his turning out and passing to the right as he certainly should otherwise have done. Under all the circumstances—the obstruction of the view and the question of fact as to the warning being in dispute, or assumed against the defendants—it was for the jury to determine whether the plaintiff's act in turning out across the easterly track was a negligent one which disentitled him to recover.

The question was whether the accident was attributable to the absence of the warning of the approach of the north-bound car or to the want of reasonable care on the plaintiff's part. The fact of warning or omission to give warning is necessarily involved in the consideration of the reasonableness of the plaintiff's conduct, and this fact, and the inferences to be drawn in whatever way it may be found, fall, as I have said, to the jury, and not to the Court to decide.

The appeal should therefore be dismissed.

GARROW and MACLAREN, JJ.A., concurred in the judgment of the Chief Justice.

MEREDITH, J.A.:—When the question which arose in this case is asked in an abstract manner, when it is asked whether it would be prudent for one, in all the surrounding circumstances of danger detailed in the evidence, to practically blindfold himself and then ride into the teeth of the traffic with nothing whatever to gain except, at the most, a few seconds of time, worth to him but a small fraction of one cent, there can be but one answer, that it would be reckless folly; it is only when we have to apply it to a concrete case, and are brought face to face with a poor man badly

wounded in a collision with a car of a supposedly wealthy and certainly unpopular corporation, to which pounds are less than pence are to the poor man, that we begin to blindfold ourselves and to cast about for some means by which the rich may be made to compensate the poor for the injury; a process not confined to juries, but equally insidious with Judges, though greater experience in the trial of such cases ought to make them more guardful against bending right to meet sympathy.

The plaintiff was, in the depth of mid-winter, and possibly numbed by cold—certainly hampered by winter clothing—riding a borrowed bicycle, with which he was not familiar, and was so riding in the heart of the business centre of the city of Toronto, in a street double-tracked by the electric railway company, and over which most of the cars of the whole city passed, so that the “head-way” between them is said to have been not many seconds.

The snow upon the streets was so heavy that bicycles could be ridden only over that part of it between the rails of the tracks, and there only because the railway company, for their own purposes only, kept them swept to enable their cars to pass up and down unobstructed by snow or ice. According to the plaintiff's testimony the snow thus swept from the tracks lay in a bank on each side, so that one riding on a bicycle upon the tracks was in a trough from which he could not escape without dismounting and carrying or dragging the bicycle over one of them.

In these circumstances the plaintiff entered upon the down-track, following the traffic at some considerable distance from the car in front of him; that car stopped to let down or take up a passenger, and the plaintiff, instead of looking when he might have seen down the other track, or crossing to it when he might for the moment safely have done so, pursued his course on the down-track until immediately behind the car in front of him, and until his view down the up-track was so obstructed by that car that he could see only a very short distance down it, was indeed practically blindfolded, by his own act, to the danger he was about to encounter.

Instead of remaining in that position, as he should have done, for the very few seconds until the car would be again in motion

and he could follow it again, he, without taking any precaution, rode into the up-track, and then saw a rapidly approaching car so near to him that he had no means of escape. To the left of him was the mound of snow forming the left-hand boundary of the trough, to the right was the car whose shelter he had just left, and in front of him was the fast approaching car on the up-track. Serious injury was almost inevitable. If he could save himself by throwing himself from the bicycle to the mound of snow beyond the track, the bicycle must remain and prove a possible source of danger to the car and all those upon it. But that which was probable happened, the plaintiff and the bicycle were injured, he very fortunately, much less than seemed likely.

To many, it might seem indiscreet of anyone, even upon his own familiar bicycle, to employ such a mode of locomotion in such a thoroughfare at such a time of the year, when a slip upon the ice or a jolt against frozen snow or other frozen substance might dislodge the rider in a place of great danger; and the more so, to proceed along the tracks, subject to the danger from moving cars, and also from the "deadly live wire," always a source of at least some little unavoidable danger—avoidable only by keeping off the track. But these were small things in comparison with the plaintiff's want of care in following the car in front of him, until it, for all practicable purposes, completely obscured his view, and then passing from a place of safety into a place of known great danger without the least need for so doing, and with substantially nothing to gain by it; risking limb and life to gain at the most but a small fraction of one cent. Being able to see a part of the car's length only was practically no better than not being able to see at all beyond the rear end of it, for a car in sight—within the twenty or thirty feet—would be of little, if any, danger; it would, at the rate at which the car in question is said to have been going, have been beside, if it had not passed, the plaintiff before he had set his bicycle in motion and reached the up-track, and at the most would probably have but brushed him aside. It was the car which was much further away, that was the source of his danger, and against which he ought to have taken great care under any cir-

cumstances, and the more so, when he was going into his wrong side of the road, against the current of the traffic, in a place where it was greatest.

Can it be doubted that, if instead of running into a car going in the proper direction, he had run into and injured another person going in that direction upon a bicycle, he would be answerable for actionable negligence? And if anyone upon the car with which he collided had been injured by the collision, would not such person have a good cause of action against him? If he meant to pass to the up-track at all he should have looked when he could have seen, and should have passed over to it when he safely might, instead of following the stopping car until so close to it that he had practically blindfolded himself to his danger. Not having done so, and having of his own choice and motion put himself in such a position, can anyone seriously say that it was not an act of great imprudence, and one which none but the reckless or foolhardy would perform, to pass from a place of safety into a place of great danger in the face of and against the rights of traffic? His intention, eventually told by himself, was to dodge the cars, to get ahead of those which obstructed his speed, by passing around them on the up-track and then passing into the down-track again, a somewhat dangerous practice in the best of weather and under most favourable circumstances.

It was suggested that the plaintiff could not remain where he was, but had to keep moving, and that, as the snow mound prevented him passing to the right side of the car and with the traffic, he was forced into the place of danger and of his injury; but there is no sort of foundation for the suggestion. If he were so inexperienced a driver, or if his borrowed bicycle fitted him so ill, that he was unable to remain upon it for the moment or so before he could move on again, it was a very simple thing, and his duty to himself, to have dismounted. It was his duty to no one to risk limb and life to avoid the trifling exertion of dismounting and mounting again, or even that, plus the gain of a fraction of one cent in time or in money.

No warning of any character seems to have been given by the plaintiff of his intention to pass the car, by ringing a bell or otherwise. It may be, that such warning might have been fruitless, but it is also possible that some one on the platform of the stopping car, or upon the street, might, having seen the approaching car, or even without seeing it, have given warning of the danger—have awakened him to a sense of his folly.

The statute provides that in the ordinary case of a bicycle overtaking any vehicle drawn by horses, and the rider, desiring to pass on the proper side, shall give audible warning of his approach before attempting to pass, and that is but a law which practical experience would dictate in the absence of any such enactment as well as with it.

The case is one in which the plaintiff has made it manifest, that by the exercise of ordinary care he would have avoided his injury, and so was rightly non-suited, whether or not, there was any reasonable evidence of actionable negligence on the part of the defendants.

The cases lend no great aid. It is seldom that any two are quite alike even in substance. Detached expressions can, of course, be cited to support almost any contention. But they are apt to be only misleading, until the context is read and the nature and the circumstances of the case in which they were used are thoroughly understood. It is sometimes said, that texts can be found to support almost any rascality if divorced from their context and misapplied. Observations borrowed from the books are quite as bendable to many uses.

The suggestion that the plaintiff was put in any imminent peril, or even in any dilemma, by the act of the defendants, has nothing substantial to support it. In stopping the car to let down or take up a passenger they were doing a lawful and proper act of constant occurrence. Behind that car, he was quite safe from it and from all cars on the other track. The suggestion that he might have feared that the car in front of him would "back up" is quite too far-fetched; it receives no sort of encouragement or countenance from the plaintiff throughout his testimony. Back up, what for? To crash into the next rapidly following car? Its business was

ahead and it was attending actively and strictly to that business. But if that were so, the less excuse there would be for coming so close to that car, for not passing over to the other track when he safely might, when he could see a long distance down it and would be far removed from any danger of sudden backing upon him. The plaintiff was put in danger by his own voluntary act, and that act put him in such great danger, that he had no choice of methods of escape, but was immediately run down.

Then it was said, that the plaintiff had a right to act as he did upon the supposition that the company would sound the gong of the on-coming car; but, in the first place, he did not so act, and indeed could not have done so, for he admits that it may have been possible for the gong to have been sounded, without being heard by him; nor can it be the law, that one can rightly do an incautious thing on the faith of another doing only that which is cautious. A vast majority of injuries are caused by the wrongful act or omission of some one. Common sense and self-preservation require that reasonable care be taken to avoid such injuries, as well as all others. Sane men do not go through life in a fool's paradise, depending upon the proper conduct in all things of their fellowmen. The defendants' failure to sound the gong would not turn the plaintiff's imprudence into prudence. It was great imprudence, recklessness, to pass from a place of safety, without any sort of substantial reason, against the current of traffic, in such a place, and into known great danger under the most unfavourable circumstances, caused by the season of the year and the ice and the snow.

The sounding of a gong in noisy Yonge street has a very different effect from sounding a gong in the restful ears of any Court. We must try to put ourselves in the street, where too much ringing of gongs may be more distracting than helpful; buildings and other things deflect sound waves. To the plaintiff, if he heard, it might have been difficult to know whether it was the gong of the car in front of him starting on again or possibly one behind him; but in any case, as he testified and as anyone would know without his testimony, the gong of the car with which he collided might have been sounded without his hearing it. A man with a bicycle to

manage in such a place at such a season of the year has his attention set more upon his work. It might have rung without being heard by him, so how can not hearing it be any kind of an excuse for recklessness?

There seems to be yet in some minds a lingering notion that the defence of contributory negligence is something peculiar, something different, from all other questions; that it must in every case and under any circumstances be a question for the jury only. At one time there seems to have been a similar notion as to all questions of negligence. But there is no sort of sound foundation for any such notion. These and all other questions are on precisely the same footing on a motion for non-suit. It is for the Court to say whether there is any reasonable evidence to go to the jury in every case and upon every question, and if not, to dispose of it without any intervention of the jury; and that is very clearly so, when, as in this case, the plaintiff himself shews that he has not a good cause of action.

The trial Judge's ruling upon this question was, in my opinion, entirely right upon principle and upon the cases which were binding upon him and upon the Divisional Court, though not upon this Court: see *Logan v. London Street Railway Co.*, not reported; *Phillips v. The Grand Trunk Railway of Canada*, 1 O.L.R. 28; and *Gallinger v. The Toronto Railway* (1904), 8 O.L.R. 698.

The other question, whether there was any reasonable evidence of negligence on the part of the defendants, causing the plaintiff's injury, is to me a more difficult one, and is one, upon which it is not necessary that I should express any opinion, having no doubt that the plaintiff's action fails on the other ground. But it should be observed that the plaintiff's action was really based upon negligence in leaving the snow piled upon each side of the tracks so that he could not pass to the right, and having passed to the left and run into danger could not escape on that side. Failing in this, a half-hearted effort was made to establish a case on the other ground, for which the plaintiff does not seem to have been prepared, and in which he does not seem to have had any great reliance. And it must be also observed that to find negligence in not sounding

the court is to over-rule the case of *Gallinger v. The Toronto Railway*, 8 O.L.R. 698.

I would allow the appeal and restore the judgment directed to be entered at the trial.

NOTE.

This case was subsequently tried at the Toronto Assizes on March 18th and 19th 1907, before Mulock, C.J., and a jury and a verdict found and judgment given in favour of the plaintiff for one thousand dollars and costs. The defendants appealed from this judgment to a Divisional Court composed of Meredith, C.J., and Clute, and Mabee, JJ., but the judgment was affirmed.

Ontario.]

[Divisional Court.

BRENNER ET AL. V. TORONTO R.W. CO.

(13 O.L.R. 423).

Negligence—Contributory Negligence—“Ultimate” Negligence—Street Railway—Injury to Person Crossing Track—Neglect of Motorman to Shut off Power on Approaching Crossing—Rule of Company—Withdrawal from Jury—Misdirection.

Negligence of a defendant incapacitating him from taking due care to avoid the consequences of the plaintiff's negligence, may, in some cases, though anterior in point of time to the plaintiff's negligence, constitute “ultimate” negligence, rendering the defendant liable notwithstanding a finding of contributory negligence of the plaintiff. Such anterior default of the defendant is “ultimate” negligence when it renders inefficient to avert injury to the plaintiff means employed by the defendant after danger became apparent, and which would otherwise have proved adequate to prevent the mischief, or renders the defendant wholly incapable of employing such means, though time was afforded for his using them efficaciously but for such disabling negligence.

Scott v. Dublin and Wicklow R.W. Co. (1861), 11 Ir. C.L.R. 377, approved.

Radley v. London and North Western R.W. Co. (1876), 1 App. Cas. 754, applied.

The plaintiff in crossing a city street in front of an approaching motor-car of the defendants was admittedly guilty of negligence or contributory negligence, but, on the evidence, would have crossed safely if a moment more had been allowed her. As it was, she was struck by the corner of the car fender and injured. There was evidence of a rule of the defendants that motormen were to shut off power at a certain distance before reaching a crossing, and that the motorman on this occasion did not do so, and in an action for the defendants' negligence causing the plaintiff's injuries the trial Judge in his charge to the jury withdrew the evidence of this rule from their consideration:—

Held, that the place where the plaintiff attempted to cross was a crossing, being opposite a street running at right angles to the street upon which the car was being operated, though not an intersecting street; and the withdrawal of the evidence as to the rule was misdirection, and misdirection which might have affected the result; the jury might, upon the evidence, have found that, but for the motorman's failure sooner to shut off power, or to reduce speed, the momentum of the car would have been so lessened that he could, with the emergency appliance at his command, have avoided running down the plaintiff; and this failure, though anterior to the plaintiff's negligence, would be “ultimate” negligence, within the meaning of the rule which makes a defendant liable, notwithstanding contributory negligence of the plaintiff, if in the result he (the defendant) could by the exercise of ordinary care have avoided the mischief.

APPEAL by the plaintiffs from the judgment of Magee, J., upon the findings of a jury, dismissing the action, which was brought to recover damages for personal injuries sustained by the plaintiff Eva Brenner, who was struck by a car of the defendants when crossing a street in the city of Toronto, owing to the negligence of the de-

endants, as the plaintiffs alleged, and for expenses occasioned to her father, the other plaintiff, in consequence of her injuries. The facts and the arguments of counsel are stated in the judgments.

The appeal was heard by a Divisional Court composed of MULOCK, C.J. Ex.D., ANGLIN and CLUTE, JJ., on the 11th, 12th, and 13th December, 1906.

W. R. Smyth, for the plaintiffs.

Wallace Nesbitt, K.C., and *D. L. McCarthy*, for the defendants.

In addition to cases cited in the judgments, the following were referred to by counsel: *Derochie v. Town of Cornwall* (1893-4), 23 O.R. 355, 360, 21 A.R. 279; *S.C., sub nom. Town of Cornwall v. Derochie* (1895), 24 S.C.R. 301; *Ford v. Lacy* (1861), 7 H. & N. 151; *Great Western R.W. Co. of Canada v. Braid* (1863), 1 Moo. P.C. N.S. 101; *Wells v. Lindop* (1888), 15 A.R. 695; *Grieve v. Molsons Bank* (1885), 8 O.R. 162; *Dunsmuir v. Lowenberg* (1903), 34 S.C.R. 228; *Hunter v. Grand Trunk R.W. Co.* (1895), 16 P.R. 385.

January 25, 1907. ANGLIN, J.:—The plaintiffs, father and daughter, appeal from the judgment of Magee, J., entered upon the findings of a jury, in favour of the defendants, and seek a new trial of this action, on the ground of alleged misdirection of the jury by the learned trial Judge.

About nine o'clock in the evening of the 9th July, 1905, the female plaintiff, a Russian Jewess, aged 18 years, in crossing the tracks of the defendant railway company in Queen street, opposite University avenue, was run down by a west-bound street car. She lost both her left arm and left leg. Though finding for the defendants, the jury assessed damages contingently—to the girl \$5,000 and to her father \$600. Their other findings were as follows:—

"1. Q. Were the defendants or their motorman guilty of negligence which resulted in injury to the plaintiff Eva Brenner?
A. No.

"2. Q. If so, wherein did such negligence consist? (Not answered).

"3. Q. Could the plaintiff Eva Brenner by the exercise of reasonable care have avoided the injury? A. Yes.

"4. Q. If so, wherein did she fail to exercise reasonable care?
A. By neglecting to take proper precautions necessary in crossing the road.

"5. Q. If she failed to exercise reasonable care, did the motor-man fail to exercise reasonable care to avoid injury to her? A. No.

"6. Q. If so, wherein did he fail to exercise reasonable care?
A. Cannot see wherein he failed."

The finding of contributory negligence is not challenged by the appellants. They concede that there was evidence to support it, and they take no exception to the learned Judge's charge upon this branch of the case. It is therefore apparent that, even should we be of opinion that the attack made upon the finding of absence of primary negligence on the part of the defendants is well founded, we could not upon that ground afford relief to the appellants. This renders it unnecessary to consider alleged misdirection in regard to the question of excessive speed, or want of control on the part of the motorman, as bearing upon the question of such primary negligence.

Since the House of Lords decided *Radley v. London and North Western R.W. Co.* (1876), 1 App. Cas. 754, it must, in our Courts, be deemed an incontrovertible proposition that, notwithstanding proven contributory negligence of the plaintiff, "if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him." As a convenient and concise term to express negligence of this description, I shall call it "ultimate negligence."

A finding of contributory negligence, involving the proposition that the plaintiff's negligence was proximate and efficient in its character, is logically no more incompatible with or exclusive of a finding of "ultimate" negligence on the part of the defendants than is the finding of primary negligence of the defendants, which likewise involves the proposition that such primary negligence was a proximate and efficient cause, incompatible with or exclusive of a finding of contributory negligence on the part of the plaintiff:

London Street R.W. Co. v. Brown (1901), 31 S.C.R. 642; *Brown v. London Street R.W. Co.* (1901), 2 O.L.R. 53.

The appellants make a very serious attack upon the charge of the trial Judge as it affected the question of "ultimate" negligence on the part of the defendants.

Eva Brenner was crossing Queen street in a north-westerly direction. She had almost cleared the west-bound car, when she was struck by the north-western corner of its fender. Had another moment been allowed her, she would have escaped injury. Could the defendants by the exercise of ordinary and reasonable care have afforded her that additional moment? If they could, they might in the result have avoided the mischief, and her negligence in crossing should not excuse them. The jury have in effect found that they could not. Unless that finding should be set aside this appeal necessarily fails.

In support of their charge of "ultimate" negligence against the defendants, the plaintiffs urge five things: 1st, that the gong was not sounded; 2nd, that the fender was improperly adjusted, being too high from the ground at one corner; 3rd, that after the girl's danger became apparent the motorman did not keep his car under "the reverse;" 4th, that but for the excessive speed of the car the motorman's efforts to avoid running down the girl would have been successful; 5th, that, but for the motorman's failure to throw off the power propelling his car at a proper distance east of University street, the momentum of the car would have been so reduced that he could have avoided injury to the plaintiff.

The first four grounds of negligence were set up in the record. The fifth ground was not specifically alleged. The first and third grounds were fairly left to the jury, and their fifth finding must be taken to mean that the gong was sounded, and that the throwing off of the reverse was not negligent, or, if it was negligent, then that the mischief would not have been prevented had the reverse not been thrown off. In either view, the plaintiffs are concluded as to these points by the finding.

The learned Judge's reference to the evidence as to the condition of the fender may not at one point have been quite accurate, but, in view of the fact that the girl did not pass under the fender but was thrown off by it to the north, a jury should not be asked to find that improper adjustment of the fender caused the mischief, or that it would have been prevented had the fender hung nearer to the ground.

Upon the question of excessive speed (excluding for the moment the bearing upon that issue of the want of proper control, alleged in the fifth ground), the conflicting evidence was fairly presented to the jury. Any omission by the learned Judge to direct the attention of the jury to the bearing upon this question of the fact that after striking the plaintiff the car ran a considerable distance before it was stopped, and any misapprehension which his remarks upon the motorman's explanation of that fact might have occasioned, were fully and satisfactorily cured when the jury was recalled and specifically charged as to this portion of the evidence and its bearing on the question of speed. In regard to this fourth ground, therefore (except in so far as it is involved in or involves the fifth ground), the plaintiffs have no cause for complaint.

The fifth ground of alleged "ultimate" negligence rests upon the following evidence. The defendants' rule No. 58, for the guidance of motormen, is in these terms: "Curves and crossings: In approaching crossings and crowded places where there is a possibility of accident the speed must be reduced and the car got carefully under control."

James Whitehead, a witness called for the defence, and who describes himself as an instructor of motormen, when dealing with this rule, says that motormen are supposed to shut off power in approaching all cross streets: if running six miles an hour, at a distance of 60, 80, or 100 feet away from the street crossings; at ten miles an hour, 20 or 30 feet sooner; and at 15 miles an hour, "20 to 30 feet farther back still." This witness further says that in approaching the corner of University street, having had full power on after leaving York street, as a competent man he would

shut off his power 40 or 50 feet before reaching the corner of University street. There is strong evidence that the speed was not less than six miles an hour. The motorman Lewis, who had charge of the car in question, says first that he ran with power on until he reached University street; and, later, that he did not throw the power off until opposite the bicycle path which runs down the east side of University avenue. In other words, instead of throwing off his power 40 or 50 feet east of University street, he kept on the power while passing that street and until he had reached the east limit of University avenue, 87 feet west of the east side of University street. If he should have thrown off the power 40 feet east of University street—or of the south-west corner of the Osgoode Hall grounds—he kept his power on, according to his own evidence, for at least 127 feet after it should have been shut off. Had the power been off while the car travelled this 127 feet, its momentum must have been materially lessened, and it seems impossible to say that, if, with the greater momentum, the use of the emergency appliances after the motorman realized the girl's danger so nearly enabled him to save her, a jury might not reasonably find that, with a reduced momentum, the motorman could have avoided the mischief. If, when the emergency arose, the motorman did everything then in his power to permit the unfortunate girl to escape, and if the maintenance of the higher momentum at the moment of the emergency might be ascribed to the failure to shut off the power at the proper point, a jury might well conclude that by that omission the motorman had put it out of his power to prevent the occurrence by the use of appliances at his command, which would otherwise have proved effective.

Upon this state of facts two questions must be answered: 1st, was the question which arises upon the evidence above epitomized fairly presented for the consideration of the jury? 2nd, assuming that the degree of momentum which the motorman found himself unable to overcome should be ascribed to his failure to shut off power at an earlier point of time, and that such omission should be deemed negligence, can that omission, which occurred before the plaintiff's danger manifested itself, though its operation and

effect continued up to the very moment of the injury, be deemed negligence which renders the defendants liable, notwithstanding the plaintiff's contributory negligence, because in the result the former might, but for this continuing though anterior negligence, have avoided the mischief?

That the duty of care which the defendants owe to persons using the streets of the city depends upon common law or statutory obligation, and not upon rules promulgated by themselves for the government of their employees, may be deemed axiomatic. But that such rules, when they concern the management of cars in matters affecting the safety of persons using the streets, afford evidence, as against the defendants, of a standard of reasonableness in regard to the subjects covered by them, which should not be withdrawn from the consideration of a jury, is also well established: *Preston v. Toronto R.W. Co.* (1905), 11 O.L.R. 56, 59, 13 O.L.R. 369. Except, perhaps, as affecting the weight which a jury should attach to them, it matters little in what form such rules are communicated to the employees—whether in print or writing or as oral directions given by an instructor. There was evidence here of a rule or direction regarding the reduction of speed, the control of the car, and the shutting off of power, which the motorman Lewis did not observe. He did not reduce the speed of his car when approaching the crossing; neither did he shut off his power.

Counsel for the defendants argued that this rule or direction does not apply to the case where an approaching street terminates at the street upon which the car is running and is not continued beyond it. Having regard to the obvious purpose and nature of the rule or direction, it should not, in my opinion, be so restricted in its application. Persons walking or driving on the south side of Queen street and desiring to proceed up University street or University avenue are obliged to cross Queen street just as they would if University street or University avenue extended south, of Queen street. In like manner persons coming down the avenue, and wishing to proceed to and along the south side of Queen street, must cross the tracks of the defendants. I find the following

definitions of "crossing:" in the Century dictionary, "the place at which a road is or may be crossed or passed over;" in the Standard dictionary, "the place where a roadway may be crossed, as a street crossing;" and in Murray's dictionary, "the place at which a street is crossed by passengers." That the foot of University street is a place at which Queen street may be and is crossed by passengers and vehicles admits of no question. The use of the term "intersection" elsewhere in the rules of the defendants also indicates the wider meaning as that intended to be given to the word "crossings" employed in the rule now under consideration. See *Williams v. Richards* (1852), 3 C. & K 81.

Was this rule or direction in regard to throwing off power when approaching crossings properly submitted to the jury as evidence of what should be deemed reasonable care, or was that evidence practically and in effect withdrawn from their consideration? In his original charge the learned Judge made no allusion to this rule. But before the jury retired the following proceedings took place:—

"Mr. Smyth: Then I would ask your Lordship to charge the jury that, in addition to the original negligence you spoke of, there was evidence from the motorman himself that he had not the car under control, according to the proper method of running as given by the witnesses for the defence themselves. Your Lordship will remember that the witnesses Whitehead and Cosgrove both said that the proper way to run the car was to turn off the power 100 feet east of Osgoode Hall corner, and the motorman himself says that he did not turn off the power until immediately before the accident. They both also said that the proper way to run it was to get the car under control when approaching the corner, by slackening the speed. The motorman says he did not put on the brake until he saw the girl would be run over.

"His Lordship: It is not a question, gentlemen of the jury, as to the motorman's duty under the rule, it is a question of what is reasonable for him to do. He may break the rules four hundred times a day, but the question is whether under the particular circumstances of the case he acted reasonably, just as any other man

going on the road. You heard, however, what he said, that he sounded the gong before he got to the west fence of Osgoode Hall, and then you heard that he had not slowed down because he was not going at a speed which he thought called for that.

"Mr. Smyth: There was the evidence of the witness who said that he ought to have taken off the power.

"His Lordship: It was said that he should have taken off the power in order to stop the car, but the motorman swears that he did throw off the power and used the gong; in fact it was said by all the witnesses that you cannot reverse until you have thrown off the power.

"Mr. Smyth: The motorman says he did that at a place a few feet short of the scene of the accident. What I have reference to is the original negligence. and the statement of the defendants' witnesses is that if running the car properly he should have thrown off the power and let the car roll a distance of 100 feet east of Osgoode Hall corner. He admittedly did not do that until long past that point, down here somewhere.

"His Lordship: Some of the witnesses say that in approaching a cross street the motorman should throw off the power so as to get the car under control. Some of them say they would do it 100 feet away, and one man said he would consider forty or fifty feet sufficient.

"His Lordship (to the jury): It is said that ordinarily it would be the duty of the motorman to throw the power off before approaching the corner, so as to let the car roll, that he would then be in a better position to have the car under control, and, if necessary, to stop. Under the rules and under the practice of the company it is the duty of the motorman to throw off the power, ordinarily, before approaching a corner, so as to be ready to get the car under control, and more readily to have it under control. But the question is, was he going at such a speed as was excessive. It is not a question of what the rule was, but was he acting improperly in going at an excessive speed at the time.

"Mr. Smyth: Then I would ask your Lordship to charge the jury that there was evidence that the motorman should have had

his car under control at an earlier period than the period when he had it under control.

"His Lordship: I think I have already said that."

After the jury had retired Mr. Smyth renewed his objection as follows:—

"Then your Lordship spoke about the only negligence which the motorman could possibly be guilty of at the moment prior to the accident being in not dropping the fender and not applying the sand. What I say about that is this, that on the evidence of the defendants' own witnesses it was the duty of this man to have had his car under a greater degree of control than he apparently had, that if he had had it under that degree of control he would have been able to stop it.

"His Lordship: His duty to the company has nothing to do with his duty to the plaintiff, which was to act reasonably."

Mr. McCarthy, for the defendants, then took this objection which I subjoin with the learned Judge's reply:—

"Then I take objection to your Lordship charging at my learned friend's request. There is no rule of the defendant company which compels the motorman to throw off the power when approaching a street crossing, and I further object that, even if there was, it was not evidence of negligence in this case, inasmuch as he might have thrown off his power before he arrived at University street, and have had on his power again before arriving at the point of contact. There is no evidence of any rule of the defendant company in that regard, and, even if he had not thrown it off or had disobeyed the rule, that there is no evidence that that in any way contributed to this accident.

"His Lordship: I told the jury that the rules of the company had nothing to do with it."

I have thought it better to set out in full the report of this portion of the proceedings, as not a little may depend upon the form, if not upon the *ipsissima verba*, of the learned Judge's observations. Having with the utmost care read and re-read these passages, which contain the whole charge upon this subject, I am unable to see how the jury could have taken from what was said to them

ought else than that they must disregard the testimony as to the defendants' rules and directions to motormen, not only as creating a duty to the public, but also as affording any evidence of what is reasonable care in the running of a car. The learned Judge appears to have been under the impression that this was the purport of his instruction, as evidenced by his reply to Mr. McCarthy. If such be the fair effect of this portion of the charge, it was, in my opinion, misleading, and amounted to a withdrawal from the jury of evidence which they should have been at least permitted, if not directed, to consider.

It is true that the jury were told that the question for their consideration was whether the speed of the car was reasonable in the circumstances. But one of the circumstances affecting this question they were told not to consider. For, although a speed of say six miles an hour may not, in the opinion of a jury, be unreasonable, if considered apart from a rule or direction of the company itself requiring a motorman whose car is approaching a crossing at that rate to reduce speed or shut off power, it is impossible to say that, if told that this rule or direction might be accepted as evidence of what the defendants deemed reasonable, the same jury might not find the maintenance of a rate of six miles an hour at a crossing, without reduction of speed and with power on, tending to increase rather than to diminish the speed, to be negligent conduct on the part of the motorman. In considering the question of speed at this point, the jury were in effect told to deal with it regardless of the rule for reduction of speed and the direction that power should be shut off. The instruction to the jury that they should pass upon the reasonableness of speed, therefore, did not, in my opinion, at all counteract the effect of the withdrawal from their consideration of the evidence as to the rules and directions of the company.

It seems impossible to say that this misdirection may not have had a serious effect upon the opinion of the jury, not merely upon the question of primary negligence, which may in the present case be unimportant, but also upon the question of ultimate negligence on the part of the defendants: *Bray v. Ford*, [1896] A.C. 44. Mis-

direction being shewn, the party upholding the verdict must, notwithstanding Rule 785, shew that the misdirection did not affect the result: *Anthony v. Halstead* (1877), 37 L.T.N.S.' 433. The jury might upon the evidence have found that, but for the motor-man's failure sooner to shut off power, or to reduce speed, the momentum of the car would have been so lessened that he could, with the emergency appliances at his command, have avoided running down the plaintiff; and they might also have found, if allowed to consider the rule as to reducing speed and control and the instruction as to shutting off power when approaching crossings, that such failure to shut off power and to reduce speed was negligence.

But would this be "ultimate" negligence, within the meaning of the rule holding a defendant liable, notwithstanding contributory negligence of the plaintiff, if in the result he (the defendant) could by the exercise of ordinary care have avoided the mischief? This question has been the subject of much keen discussion.

The rule in *Davies v. Mann* (1842), 10 M. & W. 546, as definitively stated in *Radley v. London and North Western R.W. Co.*, 1 App. Cas. 754, has been much criticized. It has been spoken of as destructive of the doctrine of contributory negligence, and as having introduced a principle of manifest injustice, and thrown the whole subject into confusion: *Thompson's Law of Negligence* (1901), sec. 230; but compare sec. 232, p. 222.

Mr. Beach in his work on *Contributory Negligence*, 3rd ed., pp. 36 *et seq.*, treats "ultimate" negligence of the defendant as inconsistent with contributory negligence of the plaintiff, maintaining that if the defendant's negligence be the "ultimate" negligence, it cannot be truly said that the plaintiff's negligence is a proximate cause of the mischief, and that, therefore, it is not really contributory negligence. This view is directly opposed to the specific proposition of Lord Penzance in *Radley v. London and North Western R.W. Co.*, and (notwithstanding any possible doubt which the recent judgments in *Reynolds v. Tilling* (1903), 19 Times L.R. 539, 20 Times L.R. 57, may suggest as to the scope and effect

of the House of Lords decision), cannot be countenanced in our Courts. In *Reynolds v. Tilling*, Walton, J., thought that a finding of ultimate negligence, if made, might have been disregarded; the report gives no reasons for the affirming judgment in the Court of Appeal, and it is not clear that the Lords Justices did not proceed upon the view that the undisputed facts of that case necessarily excluded a finding of "ultimate" negligence.

I have already said that the existence of "ultimate" negligence of the defendants is quite as compatible with contributory negligence of the plaintiff as is the latter with primary negligence of the defendants as a proximate cause.

It is elementary that in order to preclude recovery it is not necessary that the plaintiff's negligence should be the sole proximate cause of the injury; and it is equally clear that, if his negligence contribute in any degree as an operative and efficient cause, there can be no weighing of that negligence against the fault of the defendant. Where contributory negligence of the plaintiff is established, the defendant must escape liability unless "ultimate" negligence on his part is also established.

It is upon the question what constitutes such ultimate negligence, that text writers differ most widely. In their treatise on the Law of Negligence, 5th ed., pp. 99 *et seq.*, Messrs. Shearman and Redfield maintain that nothing except a new negligent act or omission of the defendant, subsequent to the negligent act or omission of the plaintiff, can amount to "ultimate" negligence on the part of the former. According to this view, the plaintiff, if guilty of contributory negligence, cannot succeed unless the mischief might have been avoided but for some new omission of the defendant to take ordinary care after he knew or should have known of the plaintiff's danger. Messrs. Clerk and Lindsell in their work on the Law of Torts, 4th ed., at pp. 502-5, discuss this question, and incline to the view that the rule as to "ultimate" negligence does not depend upon whether "the defendant's negligence was later in time than that of the plaintiff, for the negligence of the plaintiff in omitting to remove his person or property continued down to the moment of the accident just as much as did the defendant's

omission to take care; it is simply that the latter being in motion was the one who actually did the damage. He is responsible who was the efficient cause." Thompson's view agrees with that of Messrs. Shearman and Redfield: Thompson on Negligence (1901), sec. 237.

Mr. Beven's ideas upon the doctrine of "ultimate" negligence (Beven on Negligence, 2nd ed., pp. 156-7, 176) are somewhat obscure. While he recognizes the weight and authority of the Radley decision, his view seems to be that in order to establish contributory negligence the defendant must prove not only that negligence of the plaintiff was a proximate cause of the casualty, but also that the defendant could not by the exercise of ordinary care have avoided the consequences of such negligence. It would follow that where contributory negligence is properly found there can be no "ultimate" negligence of the defendant. This is singularly like Mr. Beach's view stated in another form, and does not give due force and effect to the judgment in the *Radley* case.

Mr. Smith, on the other hand, in his book on Negligence, 2nd ed., p. 232, says: "If the defendant's negligence is of such a character that he has deprived himself of his power of avoiding the plaintiff's negligence, that is equivalent to his being able to avoid it and negligently omitting to do so. . . . Suppose the defendant, sitting in his trap, negligently tied his reins to it, and fell asleep, and his horse started off; the plaintiff negligently was playing at pitch and toss in the street; the defendant, having awoke, could by ordinary care avoid running over the plaintiff, but he was too idle to untie the reins. The defendant is liable; but, could it be contended that he would be less liable if he had deprived himself of the power of exercising care in the first instance by letting the reins lie on the horse's back? Clearly he would be liable, although as a matter of fact he could not avoid the plaintiff's negligence, having put it out of his power to do so."

This view, though much criticized, receives distinct judicial support in the decision of the Irish Court of Exchequer in *Scott v. Dublin and Wicklow R.W. Co.* (1861), 11 Ir. C.L.R. 377, which is not, however, cited by Mr. Smith. Pigot, C.B., at pp. 394-5,

says: "But it is contended that the instruction given to the jury ought to have been qualified by this, that the defendants were not liable unless, *by a new physical act*, they could have avoided the consequences of the want of care on the part of the plaintiff. I can find no warrant for such a qualification in any of the authorities which have been cited. If in *Davies v. Mann*, 10 M. & W. 546, the driver of the waggon, if in *Tuff v. Warman*, 5 C.B.N.S. 573, the crew of the steamer, had become, half an hour before the collision, so drunk that their arms were powerless, and if they were still in the same state of drunkenness when the collision occurred, the defendants in each of those cases, according to the argument of the present defendants in support of this exception, must have been exempt from responsibility; because the driver in the one case, and the crew in the other, were so drunk as to be incapable of doing any physical act which could avoid the result of the plaintiff's want of care. Nay, more; if they had been only partially drunk, so as to have retained the voluntary use of their arms, the defendants would be liable; but if they were so thoroughly drunk as to have lost all muscular power, the defendants would be exempt from all responsibility, according to the rule of instruction for the jury suggested by the thirteenth exception." At p. 402 Fitzgerald, B., expresses the same view. Hughes, B., also concurred.

In *Springett v. Ball* (1865), 4 F. & F. 472, where the driver of an omnibus failed to see a person negligently crossing the street, because his attention was engrossed by his horses owing to the absence of a "skid" which he should have had, Cockburn, C.J., held that the owners of the omnibus would be liable if, but for the distraction due to the want of a skid, the driver could have seen the plaintiff in time to pull up. "He would be the cause of the accident, even although the plaintiff was in some degree careless in crossing as he did." The anterior negligence in failing to provide the skid, because it compelled the driver to devote his entire attention to his horses, amounted to "ultimate" negligence, inasmuch as it put it out of the driver's power to discharge his duty of avoiding the consequences of the plaintiff's negligence.

Sir Frederick Pollock in his work on the Law of Torts, 7th ed., says at p. 455: "It would seem that a person who has by his own act or default deprived himself of ordinary ability to avoid the consequences of another's negligence can be in no better position than if, having such ability, he had failed to avoid them; unless, indeed, the other has notice of his inability in time to use care appropriate to the emergency; in which case the failure to use that care is the decisive negligence." But in his illustrations Sir Frederick Pollock confines the application of this principle to the case of a plaintiff who by his own default has disabled himself from using ordinary care. That it must apply with equal force to a negligent defendant seems manifest. It is obvious, however, that not in every case in which there is self-created disability to avoid consequences of another's negligence will the person so disabled be treated as if "having such ability he had failed to use it," for were this so the plaintiff must have failed in the celebrated case of the tethered donkey.

In the great majority of the cases in which the question of "ultimate" negligence has arisen, the act or omission relied upon as constituting such negligence has not unnaturally been subsequent in time to the plaintiff's act of contributory negligence. But it seems repugnant to common sense to exclude from the application of this wholesome rule all cases in which, although, after the danger of the plaintiff has become or should have been apparent, the defendant has done everything then in his power to avert the mischief, he failed to avoid it solely because of the continuing effect of some anterior negligence of his own. For instance, if, in the present case, the defendants' car had not been equipped with a brake or reversing machinery, the sending out of a car thus deficient would have been an act of negligence clearly preceding in point of time any negligence of the plaintiff. If, excluding all other negligence on the part of the defendants, it were clear that, upon the emergency arising owing to the plaintiff's want of care, the use of the lacking brake or reverse would have avoided the injury, should the defendants be heard to say that because the want of brake or reverse was due to an antecedent omission of duty on

their part, the failure to avert the mischief would not amount to "ultimate" negligence? Can any tangible distinction be drawn between the case in which a car is wholly unequipped with such emergency appliances and the case in which that equipment is rendered inefficient and practically useless through some neglect of duty of the defendants?

Again, the duty of the defendants to the plaintiff, breach of which would constitute "ultimate" negligence, only arose when her danger was or should have been apparent. Prior to that moment there was an abstract obligation incumbent upon them to have their car equipped with efficient emergency appliances ready and in condition to meet the requirements of such an occasion. Had an occasion for the use of emergency appliances not arisen, failure to fulfil that obligation would have given rise to no cause of action. Upon the emergency arising, that abstract obligation became a concrete duty owing to the plaintiff to avoid the consequences of her negligence by the exercise of ordinary care, breach of which would constitute actionable negligence. Up to that moment there was no such breach of duty to the plaintiff. In that sense the failure of the defendants to avoid the mischief, though the result of an antecedent want of care, was negligence which occurred, in the sense of becoming operative, immediately after the duty, in the breach of which it consisted, arose. It effectively intervened between the negligence of the plaintiff and the happening of the casualty.

Where, as here, both plaintiff and defendant are present at the time of the occurrence producing injury, the crucial question appears to be—which of them had, or, but for some disabling negligence of his own, would have had, the last opportunity to avoid the mischief. The duty of both plaintiff and defendant, each to avoid the consequences of negligence on the part of the other, is the same. Where negligence of the plaintiff is established, if, after the peril is imminent, both plaintiff and defendant might by the exercise of ordinary care avoid the casualty, the plaintiff cannot recover. If, without any fault of his own, neither could then avoid the catastrophe, again the plaintiff cannot recover; he is in the like

plight, if he alone could, or, but for his own fault, might then have, prevented the mischief. But if, in like circumstances, the defendant alone could, or, but for his own default disabling him from so doing, might, have avoided the casualty, he should be held liable.

The distinction between causes described as "proximate," "efficient," or "decisive," on the one hand, and causes spoken of as "merely inducing," or "*sine quâ non*," or "amounting rather to conditions," on the other, is well established in jurisprudence. This distinction is applied as the test to determine the materiality of original negligence of a defendant and of contributory negligence of a plaintiff. The same or a like test, applied to negligence that renders abortive efforts, made after peril has become imminent, to avert disaster, would seem to afford a reliable criterion by which to determine whether such negligence is indeed that "ultimate" negligence—that last operative breach of duty—which justifies the assertion that the person guilty of it might in the result have avoided the consequences of the negligence that created the situation of peril.

I eliminate, as presenting no serious difficulty, cases in which the defendant has been guilty of a new physical act of negligence, whether of omission or commission, after the plaintiff's danger became obvious; and, for the same reason, cases in which, after peril was imminent, the plaintiff could by ordinary care have escaped injury. To avoid grappling with unnecessary though interesting problems, I also put aside cases in which either plaintiff or defendant is absent from the scene of the accident. I also exclude cases in which the mischief is an instantaneous result of the operation of the joint negligence of the defendant and the plaintiff; in such cases no question of ultimate negligence arises. This was probably the view taken of the facts in *Reynolds v. Tilling* in the English Court of Appeal, and, if so, the decision of that case is readily intelligible.

But there is a class of cases where a situation of imminent peril has been created, either by the joint negligence of both plaintiff and defendant, or, it may be, by that of the plaintiff alone, in which,

after the danger is or should be apparent, there is a period of time, of some perceptible duration, during which both or either may endeavour to avert the impending catastrophe. The negligence that created the peril, though still operative in one sense, has, in another sense, spent itself, and ceased to operate. It has given place to efforts to escape its consequences. Such efforts, within the limits of ordinary care, it is the duty of both plaintiff and defendant to make. If, from no other cause than the nature of the situation itself, such efforts duly made prove unsuccessful, although the incapacity of the person making them may be said to be due to the negligence which created the situation of peril, that negligence at this stage bears to such incapacity rather the relation of a remote cause or cause *sine quâ non* than that of a proximate and efficient cause. But if, notwithstanding the difficulties of the situation, efforts to avoid injury duly made would have been successful, but for some self-created incapacity which rendered such efforts inefficacious, the negligence that produced such a state of disability is not merely part of the inducing causes—a remote cause or a cause merely *sine quâ non*—it is, in very truth, the efficient, the proximate, the decisive cause of the incapacity, and therefore of the mischief.

There is no English or Canadian authority, so far as I am aware, which is inconsistent with the judgments of Pigot, C.B., and Fitzgerald, B., in the Irish Court of Exchequer (*Scott v. Dublin and Wicklow R.W. Co.*, 11 Ir. C.L.R. 377). The view there taken and so well expressed by Mr. Smith, and indorsed *sub modo* by Sir Frederick Pollock, appeals to me as logically sound. Moreover, to permit incapacity created by the default of the defendant himself to serve as an excuse for a failure to prevent injury to the plaintiff, which would be otherwise inexcusable, savours of injustice. Not without hesitation, because of the volume of American authority opposed to this view, and of the manifest difficulty which it may occasion in some cases in drawing a clear distinction between primary and ultimate negligence, I have reached the conclusion that negligence of a defendant incapacitating him from taking due care to avoid the consequences of the plaintiff's negligence, may, in some cases,

though anterior in point of time to the plaintiff's negligence, constitute "ultimate" negligence, rendering the defendant liable notwithstanding a finding of contributory negligence of the plaintiff. Such anterior default of the defendant is, in my opinion, "ultimate" negligence, when it renders inefficient to avert injury to the plaintiff means employed by the defendant after danger became apparent, and which would otherwise have proved adequate to prevent the mischief, or renders the defendant wholly incapable of employing such means, though time was afforded for his using them efficaciously but for such disabling negligence.

In the present case it is clear upon his own story that after the plaintiff's danger became apparent to him, there was a period of time, short it may be, but distinctly perceptible, in which the motorman endeavoured to avoid running down the girl by lessening the momentum of his car. The situation in which the plaintiff found herself was apparently such that her efforts at self-preservation after the peril became imminent were futile because of the intrinsic difficulties of her position. It may be that the motorman's efforts were likewise unsuccessful solely because of the difficulty of the situation then developed. But, having regard to the facts that another moment of time would have enabled the unfortunate girl to have escaped; that the momentum of a car with power thrown off will be considerably reduced in running 127 feet or even 87 feet; that it was admitted by the motorman that power was not thrown off until the car was 87 feet west of the south-west corner of the Osgoode Hall property; and that there was evidence upon which a jury, had it not been withdrawn from them, might have found that it was negligent not to have had the power off when the car was 40 feet to the east of that corner, or at least before it passed the corner—it seems impossible to say that, had this issue been presented for their consideration with all the evidence bearing upon it, and under a charge defining "ultimate" negligence, as outlined above, the jury might not have found that, notwithstanding her contributory negligence, the defendants might in the result by the exercise of ordinary care have avoided injury to the plaintiff. An important part of the evidence was unfortunately withdrawn, in my opinion

improperly, from the consideration of the jury; and, though the learned Judge did not in terms direct the jury that ultimate negligence of the defendants must consist in some new physical act or omission of the motorman subsequent to the plaintiff's danger becoming apparent, that is the purport and effect of all that he said upon this branch of the case.

For these reasons I regard the verdict and the judgment founded upon them as unsatisfactory, and I would set them aside and direct a new trial of this action. But, inasmuch as the attention of the learned Judge was not clearly directed by counsel to the bearing upon the question of ultimate negligence of the portion of his charge which is, in my opinion, unsatisfactory, and disregard of the rule as to reducing speed and the direction as to shutting off power when approaching crossings is not alleged as a ground of negligence upon the record (though evidence upon these matters was admitted without objection), costs of the former trial and of this appeal should be costs in the cause.

MULOCK, C.J.:—I agree.

CLUTE, J.:—I have read the very full and lucid judgment of my brother Anglin, where the facts and grounds of objection to the charge of the learned trial Judge are sufficiently set forth.

I agree, for the reasons therein stated, that there was a misdirection. The jury were in fact told, as the learned trial Judge himself states, "that the rules of the company had nothing to do with it." The rules of the company I take to be the instructions, whether written or verbal, provided by the company to guide their motormen in running their cars.

Whitehead, one of the defendants' witnesses, and appointed by them as instructor of motormen, says at pp. 220-1:—

"Q. Is not there a rule that you shut off the power on approaching a street? A. Yes, they are supposed at all cross-streets to shut off the power and ring the gong.

"Q. How far? A. A reasonable distance; it depends upon the speed you are travelling at.

"Q. You will have to let me know how far you consider a reasonable distance: 'When approaching crossings and crowded places where there is a probability of accidents, the speed must be reduced and the car got carefully under control.' That is rule 58. You impress that upon your motormen? A. Yes.

"Q. Then at what distance from the crossing do you consider that the man should shut off his power and begin ringing the gong? A. It depends upon the speed at which he is travelling.

"Q. Supposing he is travelling six miles an hour? A. He should shut off his power 60, 80, or 100 feet away from the street crossing.

"Q. And at ten miles? A. A little sooner."

Then at p. 223: "Q. If you had your power on full after leaving York street, where would you turn it off? A. I would shut it off 40 or 50 feet back from the corner of University street or whatever you call it."

This witness thinks that a car might be stopped by reversing, in 50 feet, and at p. 230 is asked:—

"Q. Do I understand there are instructions to motormen to stop at cross-streets? A. Decidedly no, only at intersections of other tracks.

"Q. You do not mean to say at all cross-streets? A. No, but a man naturally, as a precaution, shuts off the power when coming to a street; he is not supposed to stop unless it is necessary.

"Q. He has to shut the power off? A. Well, I do it at every cross-street as a precaution.

"Q. Coming to every cross-street you shut it off? A. I shut off my current.

"Q. For what purpose is that? A. Just as a precaution in case of anything happening, not that I am expecting anything, but we never know what is coming.

"Q. Would you do that when approaching a crossing at five or six miles an hour? A. Yes, decidedly."

This precaution of shutting off the power in approaching a crossing is enjoined by the company, and may fairly go to the jury as the company's view of what would be reasonable and proper in approaching a crossing to avoid any danger.

Rules and directions are here prescribed, which, if disregarded, would be some evidence of negligence on the part of the motorman. The motorman in question swears he did not turn off the power until opposite the bicycle path, which would be about 127 feet west of the point where the power ought to have been turned off.

I have read and re-read the charge of the learned trial Judge bearing upon this point, and from it I think that the jury could not otherwise have interpreted the charge but to mean that it was of no consequence whether the rule and instructions, as above given, were disregarded or not. The charge in this regard is, in my judgment, a misdirection. But that, of course, is no ground for a new trial unless some substantial wrong or miscarriage has been thereby occasioned.

This piece of evidence, which was, in effect, withdrawn from the jury, had a direct bearing upon the question of the defendants' negligence, and one cannot say what might have been the finding had the charge in this regard been otherwise than it was. No doubt, a finding that the plaintiff could by the exercise of reasonable care have avoided the accident would have disentitled the plaintiff to succeed, even had the jury found the defendants guilty of negligence; and, as it was stated that the charge was without objection, in so far as it referred to the contributory negligence of the plaintiff, it would appear that the misdirection, if there be any, has not as to this finding resulted in any substantial wrong to the plaintiff. It could only be of importance if it has relation to that which enters into the consideration of the further and more difficult question, namely, could the defendants by the exercise of ordinary care and diligence have avoided the accident notwithstanding the negligence of the plaintiff? In other words, had it any bearing on the answer to the fifth question, namely, "If the plaintiff failed to exercise reasonable care, did the motorman fail to exercise reasonable care to avoid injury to her?" The jury have answered this question "no." Unless, therefore, it can be shewn that the misdirection may have affected the minds of the jury in coming to a decision on this question, it is immaterial. There is evidence that the car

went some distance beyond where it should have gone after the brakes were applied, if it had been under proper control.

If the jury were permitted to consider the evidence of the neglect of the motorman to turn off the power before reaching the crossing, it might have influenced their finding as to whether or not, notwithstanding the plaintiff's negligence, the motorman might have avoided the accident. The question then comes, if this default of the motorman may be considered in dealing with that question, then was there a misdirection which had a direct bearing upon the result? To put it in other words, may the default which occurred before the collision took place be regarded as a continuing negligence so as to be taken into consideration in deciding what the motorman ought to have done in the premises? Did he, in short, preclude himself from effectively operating the appliances at hand to stop the car? It seems reasonable that the jury should have the right to consider all conditions affecting the case in order to reach a proper judgment upon this point. If, as a matter of fact, the appliances may have been effective, but were not because of the defendants' prior negligence, which in its effect was still existing, then it is as if the defendants by their motorman neglected to do that which they might have done to have avoided the injury. It brings up the question which has been very fully treated by my brother Anglin, and I agree in the conclusion at which he has arrived. It presents itself to my mind in this way: suppose a motorman by reason of his prior intoxication had rendered himself unfit and incapable of applying the brakes effectively so as to avoid the accident, could it be doubted that the defendants might still be liable notwithstanding the plaintiff's negligence? Does it make any difference that his fault was, in not having the car under control so as to enable him to work the appliances with effect? I think not. Whether the prior default affected himself or that which he was to operate, could, it seems to me, make no difference. In either case he seeks to excuse himself by taking advantage of his own wrong. This he ought not to be permitted to do. If he says, I used all the appliances at hand but was unable to stop the car, the answer comes, you might have stopped the car if you had not

yourself put the car in the condition which prevented you from doing so; and any evidence which would support that view ought to be left to the jury.

Now, it cannot be doubted, I think, that if he had turned off the power before reaching the crossing, the car would have had less momentum; the appliances for stopping the car might have worked effectively, and the plaintiff might have received the extra time necessary to enable her to escape. This is the evidence which, by the misdirection, in my humble opinion, was in effect withdrawn from the jury. It seems impossible to say, therefore, that there was not a substantial wrong or miscarriage occasioned by the misdirection; it is sufficient that the result might have been different. The full evidence bearing upon this vital point—and as it turns out the only point in question—the jury were not permitted to pronounce upon; at least they were told that it was a matter of no importance. I think this view does not introduce any new principle. None of the authorities, as far as I have been able to find, goes so far as to say that there may not be a continuing negligence. They are very fully dealt with in *Scott v. Dublin and Wicklow R.W. Co.*, 11 Ir. C.L.R. 377, quoting with approval the rule as laid down in *Tuff v. Warman*, 5 C.B.N.S. at p. 584, and which is not in conflict with *Davies v. Mann* or the *Radley* case. As put by Mr. Smith in the 2nd edition of his work on Negligence, at p. 232: "If the defendant's negligence is of such a character that he has deprived himself of his power of avoiding the plaintiff's negligence, that is equivalent to his being able to avoid it and negligently omitting to do so."

The general rule of law in cases of this kind, as laid down by the House of Lords in *Radley v. London and North Western R.W. Co.*, 1 App. Cas. at p. 759, is as follows: "The first proposition is a general one, to this effect, that the plaintiff in an action for negligence cannot succeed if it is found by the jury that he has himself been guilty of any negligence or want of ordinary care which contributed to cause the accident. But there is another proposition equally well established, and it is a qualification upon the first,

namely, that though the plaintiff may have been guilty of negligence, and although that negligence may in fact have contributed to the accident, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him."

In reference to the last proposition it was strongly urged by Mr. Nesbitt that what may be called ultimate negligence must be subsequent in point of time to the contributory negligence of the plaintiff; that the defendants were not liable *unless by some new physical act subsequent in point of time* they might have avoided the want of care on the part of the plaintiff. This is to engraft a qualification on the rule as laid down by the House of Lords, and I find no authority for its warrant. Such a qualification would, in my opinion, curtail the usefulness of the rule, and without any just reason for so doing that I can find.

If a defendant has by his own prior wrongful act done that which necessarily precludes him from doing what is his manifest duty to do, he ought not to be permitted to avail himself of such default as an answer to his neglect; and this, I think, is especially so where, as in the present case, the instrument of danger is a railway car, which admittedly requires constant caution and care in its management.

I think that the evidence with reference to the turning off of the power before reaching the crossing was relevant to the issue of ultimate negligence. I do not see how a jury could properly deal with that question without giving whatever weight was due to that evidence as a part of the case, and that was practically excluded by the learned trial Judge; the plaintiff was prejudiced in the trial of her action; the result was possibly affected and there ought, in my judgment, to be a new trial. Costs of the former trial and of this appeal to be costs in the cause.

NOTE.

The defendant appealed from this judgment to the Court of Appeal and the appeal has been argued and now (May 1907), stands for judgment.

Ontario.]

[Court of Appeal.

SCHWOOB V. THE MICHIGAN CENTRAL R.W. Co.

(13 O.L.R. 548).

Negligence—Master and Servant—Defect in Machinery—Defective System of Inspection—Workmen's Compensation for Injuries Act—R.S.O. 1897, ch. 160, sec. 3, sub-sec. 1, sec. 6, sub-sec. 1.

On the trial of this action—which was against a railway company to recover damages for the death of the deceased through scalding by the escape of steam occasioned by the giving away of a water tube in a locomotive engine on which he was working—the jury, in answer to questions submitted to them, which, with the answers to them, are set out in the report, found that the death was caused by a defect in the condition of the locomotive, “through the defendants not supplying proper inspection,” the defect itself not being specified, but from a discussion which the trial Judge had with the jury when they brought in their answers, and from the answers to further questions submitted to them, such defect it appeared consisted in the fact that the end of the tube in question had not been sufficiently “belled” by one J., who had put the tube in the boiler:—

Held, that there was no evidence to support liability at common law, but that the evidence and findings of the jury sufficiently established what the defect was, and that J. was a person entrusted with the work, so that there was liability under the Workmen's Compensation Act, in respect of which the deceased's widow and administratrix could maintain the action, and was entitled to recover the damages assessed by the jury under the above Act.

MEREDITH, J. A., dissenting on the question of liability under the Act.

THIS was an action brought by the widow and administratrix of Robert H. Schwoob, deceased, to recover damages for his death while in the employment of the defendants as locomotive fireman, resulting from his being scalded, through, as was alleged, the defendants' negligence, by steam formed by the escape of hot water into the fire box of one of the defendants' locomotive engines, through the drawing out of one of the hot water tubes or pipes from the end of the tank in which it was fastened.

The action had been previously tried, and a new trial directed by the Divisional Court, which was affirmed by the Court of Appeal. The judgments are reported in 9 O.L.R. 86 and 10 O.L.R. 647.

The trial herein was before TEETZEL, J., and a jury, at St. Thomas, on March 26th, 1906.

T. W. Crothers and S. Price, for the plaintiff.

D. W. Saunders and E. C. Cattnach, for the defendants.

The evidence shewed that the tube which drew out of the end of the tank, had been put in the engine in the defendants' workshop in order to replace one that had become defective, and there was evidence that the tube drew out because the defendants' workman, whose duty it was to attend to such repairs, had not fastened it securely by "belling" the end of the tube sufficiently to prevent it drawing out.

The evidence also shewed that in this class of engine there were four of such tubes, and that all four tubes had been put in the engine at the same time. After these repairs the engine had been in use for several months without any defect being apparent in any of the tubes; that some of the other tubes had appeared to be leaking, and were replaced, but no defect was discovered in the tube in question prior to the accident, though the engine and tubes were constantly inspected.

It was not claimed that Thomas Jeffers, the workman, who fastened the tubes, including the tube in question, in the boiler, was not a competent workman; but it was charged that it was his carelessness and negligence in failing to fasten the end of the tube properly that caused the accident.

On behalf of the plaintiff it was also contended that there should have been inspection of Jeffers' work before the engine was allowed to be used, after the tubes had been put in; and also that the subsequent inspection of the engine from time to time was not sufficient, having regard to the possibility of such tubes warping and drawing out; and that the defendants were liable at common law for negligence in not providing for such inspection.

It was also contended that Jeffers was a person "entrusted with the duty of seeing that the condition or arrangement of the ways, works, machinery, etc., are proper," so as to make the defendants, in any event, liable for his negligence under section 3 (1) and section 6 (1) of the Workmen's Compensation for Injuries Act, R.S.O. 1897, ch. 160.

At the conclusion of the plaintiff's case a motion was made for a nonsuit, and at the conclusion of the whole case to have judgment entered for the defendants, both of which were refused, and the case was submitted to the jury with certain questions which with the answers thereto, were as follows:—

1. Was the death of the plaintiff's husband caused by reason of any defect in the condition or arrangement of the locomotive on which he was working? A. Yes.

2. If your answer is "yes," you will state in what such defect consisted. A. We find in our opinion that said defect occurred by the defendants not supplying proper inspection.

3. If there was any such defect, did it arise from the negligence of the defendants or of some person in their employment entrusted by the defendants with the duty of seeing that the condition of the locomotive was proper? Answered by 2.

4. If your answer to this question is "yes," and you are of the opinion that the negligence was that of an employee of the defendants, who was that employee? Answered by 2.

5. Or if there was any such defect, was it not discovered or remedied owing to the negligence of the defendants or of some person in their employment entrusted by them with the duty of seeing that the condition of the locomotive was proper? Answered by 2.

6. If you answer this question "yes," and are of the opinion that the negligence was that of an employee, who was the employee? Answered by 2.

7. Were the defendants guilty of negligence in connection with the system provided for by them for the inspection of the locomotive in question? A. Yes.

8. If "yes," in what did the negligence consist? A. By not providing proper inspection.

9. If the defendants were guilty of any negligence, did such negligence cause the death of the plaintiff's husband? A. Yes.

10. In what sum do you assess the plaintiff's damages, if entitled to recover under common law? We decide that the plaintiff shall be awarded nine thousand dollars, and recommend that your

Lordship use your own jurisdiction, if you have any, in safeguarding of at least a portion of this money for training and educating the plaintiff's children.

On the jury returning with their answers to the questions submitted, the learned Judge pointed out that if on appeal it should be held that there was no common law liability they could only award the amount of three years' salary, amounting to \$3,240—or less. He also desired a finding as to whether there was any defect in the way the tube was fixed by Thomas Jeffers; and he submitted the following additional questions to the jury, which with the answers thereto were as follows:—

Q. Was there any defect in the way the tube in question was fixed in the boiler by Thomas Jeffers at the time it was put in? A. Yes, and at the time we think that there should have been proper inspection.

Q. If you find there was a defect in the way in which Jeffers put the tube in, what was that defect? A. It was not properly belled.

Q. Are you of opinion that proper inspection would have revealed that defect? A. Yes.

Q. At what amount do you assess the damages if it should be held that the plaintiff is only entitled to recover under the Workmen's Compensation Act? A. \$3,240.

The learned Judge thereupon entered judgment for the plaintiff with \$9,000 damages, and apportioned the amount by giving \$3,000 to the widow and \$2,000 to each of the deceased's three children.

From this judgment the defendants appealed to the Court of Appeal.

On September 27, 1906, the appeal was argued before Moss, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, J.J.A.

I. F. Hellmuth, K.C., and *D. W. Saunders*, for the appellants. There is no liability at common law. At common law a duty is undoubtedly imposed on the employer to supply proper machinery and to have it properly inspected. This must be done personally,

or by the employment of competent persons for the purpose. In the case of a corporation, the latter is the only course open to them, for they can only act through persons employed by the corporation. The engine was properly constructed, and was also duly inspected. It was shewn in the evidence for the plaintiff that an inspection once a week would be sufficient, whereas an inspection was made here at least twice a week. The contention of the plaintiff that the pipe or tube was not properly belled is disproved by the evidence, for the evidence shews that the bellying was carefully examined in the inspection. No neglect of duty is brought home to the defendants. Jeffers who did the work was a fellow servant of the plaintiff in a common employment: *Woods v. Toronto Bolt and Forging Co.*, 11 O.L.R. 216; *The Petrel*, [1893] P. 320; *Morgan v. Vale of Neath R.W. Co.* (1865), 5 B. & S. 570, 580, affirmed (1866), L.R. 1 Q.B. 149; *Howells v. Landore Siemens Steel Co.* (1874), L.R. 10 Q.B. 62; *Waller v. South Eastern R.W. Co.* (1863), 2 H. & C. 102, 112; *Farwell v. Boston and Worcester R.W. Co.* (1842), 4 Metc. 49, 59-60. The Workmen's Compensation Act does not apply. There is no evidence of negligence on the part of any person entrusted with the duty of seeing as to the condition or arrangement of the ways, works or machinery. In no event can the findings of the jury stand, as they are based merely on conjecture. As to the amount of the damages, they are clearly excessive. The plaintiff was earning \$1,000 a year, and it is apparent this would not justify an allowance of \$9,000.

T. W. Crothers, for the respondent. The employer at common law is bound to take all reasonable precautions to ensure the safety of his employees. It was therefore the defendants' duty to see that the engine was in perfect order. Unless the pipe or tube was properly belled it is likely to draw out, and therefore to be dangerous. It was therefore the defendants' duty to see that it was properly belled, and that the bellying was from time to time properly inspected, which the evidence shewed they had failed to do: *Webster v. Foley* (1892), 21 S.C.R. 580. All they did was to see the pipe was properly rolled, the object of rolling being merely to prevent leakage. There was no proper mode of inspection. Jeffers, who

was entrusted with this work, was not sufficiently skilled for the purpose. Had there been a proper inspection the defect would have been seen and remedied. There should have been a competent inspector. Jeffers, however, was specially entrusted with seeing to this particular branch of the work, and could in no sense be deemed to be a fellow servant: *Markle v. Donaldson* (1904), 7 O.L.R. 376, 8 O.L.R. 682; Beven on Employers' Liability, 2nd ed., 178. The defendants were therefore liable at common law: Beven's Employers' Liability, 2nd ed. 16; Minton-Senhouse on Accidents to Workmen, 2nd ed. 12-13; *Commarford v. Empire Limestone Co.* (1905), 11 O.L.R. 119. There was also liability under the Workmen's Compensation Act. Jeffers was a person entrusted with the duty of seeing that the pipe was properly belled, and through his incompetence or negligence it was shewn the belling was insufficient: *Choate v. Ontario Rolling Mill Co.* (1900), 27 A.R. 155; *McNaughton v. Caledonian R.W. Co.* (1857), 28 L.T.N.S. 376; *Spaight v. Tedcastle* (1881), 6 App. Cas. 217; *Northern Pacific R.W. Co. v. Hambly* (1894), 154 U.S.R. 349; Beven on Employers' Liability, 2nd ed., 176. The damages are in no way excessive.

November 30, 1906. OSLER, J.A.:—I agree that the evidence fails to make out a case of common law liability on the part of the company.

The judgment may, however, be supported for damages under the Workmen's Compensation Act if the findings of the jury either by themselves or read with the learned Judge's charge and with facts proved or admitted and not denied, come up to what is required by that Act in order to fix liability upon an employer. Upon the whole I think they do.

The case was very fully and carefully explained to the jury in the learned Judge's charge, and the difference between the liability of the employer at common law and under the statute pointed out to them. It is very evident that they meant, if they could possibly do so, to fasten upon the defendants that ground of liability which would enable them to assess the damages at large; that result

cannot stand, but certain of the findings may be referred to to support the judgment for the reduced sum recoverable on the narrower ground.

They found that the death of the plaintiff's husband was caused by reason of a defect in the condition or arrangement of the locomotive on which he was working. Their answer to the second question as to what such defect consisted in, is that the defect occurred by the defendants "not supplying proper inspection," and as want of inspection, unless there was some existing defect which inspection would have disclosed, is not defect, or by itself, negligence, the answer is not very intelligible until it is remembered that the only defect about which the contest was waged throughout the trial was that the tubes of the engine had not been properly belled, and in the conversation which took place between the trial Judge and the jury after they had brought in their answers to the first set of questions this is made clear. They all agreed, they said, that the defect which caused the accident was that the bellying of the tube had not been properly done, adding that there should have been more proper inspection, which would have discovered it.

The answers to questions 3 to 6 may be passed over; indeed it may be more properly said that the jury left these questions unanswered by referring in each instance to their answer to question 2, as making it unnecessary to give specific answers, their finding as to the ground of liability resting upon that. After the discussion referred to, the jury, in answer to further questions founded upon it, said that there was a defect in the way the tube was fixed in the boiler by Jeffers at the time it was put in, and that this defect was that it was not properly belled. Reading these answers with the answer to the first question and the discussion referred to, a case for liability under sec. 3 (1) of the Act is made out subject to the qualification of sec. 6 (1) being also established, namely, that Jeffers, the person from whose negligence the defect in the locomotive arose, was a person who had been entrusted by the defendants with the duty of seeing that its condition was proper. There is no dispute—there was none throughout the whole course of the trial, and the learned Judge in his charge referred to it again

and again,—that Jeffers was the person in the employ of the defendants who was so entrusted. We have it therefore established that the death of the plaintiff's husband was caused by a defect in the condition of the locomotive on which he was working; that this defect consisted in the improper way in which Jeffers fixed the tubes in the boiler of the locomotive, and that he was the person who had been entrusted by the defendants with the duty of having this properly done—in other words, the duty of seeing that the condition of the locomotive was proper. This is all that is necessary to fulfil the requirements of the Act in such a case as the present.

I am unwilling to send the case down for a third trial without any prospect of a different result if by any reasonable interpretation of the answers of the jury read in the light of the charge and of the admitted facts, this can be avoided. If I have been unduly swayed by this consideration I must leave it for a higher tribunal to say so.

See *Jamieson v. Harris* (1905), 35 S.C.R. 625; *Tooke v. Bergeron* (1897), 27 S.C.R. 567; *Moore v. Grand Trunk R.W. Co.* (1907), S.C.R., not reported, and of which the reasons for the decision are not yet known.

The judgment should therefore be varied and the recovery limited to the alternative amount found by the jury, the method of arriving at which was not complained of. There will be no costs of the appeal, success being divided.

MOSS, C.J.O., GARROW and MACLAREN, JJ.A., concurred.

MEREDITH, J.A.:—The plaintiff's present difficulty has arisen from too intently pursuing the shadow of a greater claim under the common law, and putting aside too much, that which may have been the substance of a lesser—but yet large—claim under the statute law; a pursuit in which the jury, in a desire to award to her "all that was possible to award," seem to have joined.

The first seven questions submitted to them were framed with the view to the jury finding negligence on the part of the witness Jeffers, or some other workman, and finding the other facts which

would make the defendants liable under the statute, if they found against them at all; and the 7th and following questions were directed to the subject of liability at common law. The form of the questions shews this; and the jury were very plainly told that the 7th question involved inspection of Jeffers' work as well as any general inspection of the locomotive; they were told that the 7th question involved this: "Was the system of inspection of the work of their employee who put this pipe in originally"—Jeffers—"or of the condition of the locomotive from time to time afterwards until the accident occurred such as in your opinion constituted a discharge of the duty which the employers owed to the deceased of maintaining the machinery and plant in a reasonably safe condition?" And, he pointed out the difference in amounts which might be awarded for a liability at common law and under the statute, and the way by which they might choose between the two, and give effect by their findings to the greater claim. And so intent upon doing that, they seem to have been, that instead of merely answering the 7th and following questions in the plaintiff's favour, they duplicated such findings in answer to some of the earlier and inappropriate questions; so that we have the somewhat incongruous findings, that there was a defect in the locomotive, caused by the want of inspection, or, to use the jury's own words, "occurred by the defendants not supplying proper inspection;" the jury probably meaning that there was a defect which ought to have been discovered and remedied through proper inspection. The obvious purpose of the 2nd question was to find out the nature of the defect referred to in the 1st question and the answer to it, and the answer to the following four questions negative any claim that the negligence of Jeffers, or of any servant of the defendants, was the cause of the accident, the jury being set on finding direct liability so as to be able to award damages at common law.

When they returned with their verdict to that effect, and having given an answer to every question, the trial Judge then, doubtless finding the questions unexpectedly answered, proceeded to question the jury as to negligence on the part of Jeffers—the propriety of which I am doubtful, especially as the further questions asked

were incomplete and obviously insufficient to support any verdict—and they answered that Jeffers had been negligent, but still clung to their finding that the defendants directly caused the accident by want of proper inspection; thus: "Yes, my Lord, and we think there should have been *some proper inspection* that would have discovered *that which would have made the company responsible.*" The after-thought questions seem then to have been put in writing and so answered; but how and when is not shewn by the notes of the trial; and here again the jury persist in their finding of liability by reason of want of proper inspection. These questions and the answers to them are as follows:—

"Q. Was there any defect in the way the tube in question was fixed in the boiler by Thomas Jeffers at the time it was put in? A. Yes, and at the time we think there should have been proper inspection.

"Q. If you find there was a defect in the way in which Jeffers put the tube in, what was that defect? A. It was not properly belled.

"Q. Are you of the opinion that proper inspection would have revealed that defect? A. Yes.

"Q. At what amount do you assess the damages if it should be held that the plaintiff is only entitled to recover under the Workmen's Compensation Act? A. \$3,240."

It is quite plain, therefore, that the jury have found that the proximate cause of the accident was the want of proper inspection only, and that if the judgment cannot be supported on that ground it cannot be supported at all, (1) because there is no finding of any sort by the jury that the negligence of Jeffers was either proximately or remotely the cause of the accident (none of the after-thought questions touched that point), and (2) it was negatived by the answers to the questions first submitted. It was expressly covered by questions 3 and 4, and negatived by the answers to these questions, the jury saying "answered by 2," that is, that the cause of the accident was there given; and (3) because of the jury's persistent findings that the cause of the accident was want of inspection. We

cannot add to the jury's findings, and we certainly cannot add to it something inconsistent with them, namely, that the proximate cause of the accident was not want of inspection but was Jeffers' negligence in belling the tube; they shewed too plainly and persistently their intention that the plaintiff should recover at common law, and that they would not have found any facts to create the lesser liability, unless they had been told that it was the half loaf or nothing at all, and they were told anything but that.

Then can the judgment be supported on the findings of want of proper inspection? In the first place it may be observed that no indication is given of the character of the lacking inspection, whether it was inspection of Jeffers' work before letting it go out, or other general inspection of the locomotive from time to time with a view to preventing accidents and remedying defects, or inspection of any other general or particular character. Question 8, which was directed plainly to this point, is substantially unanswered; to say that neglect to provide a proper system of inspection consisted in "not providing proper inspection" is not very enlightening. To one of the supplemental questions the answer was given that inspection would have revealed the insufficient belling of the tube, but that reveals little, if any, information as to the nature of the inspection which the jury found to have been wanting and to have caused the accident.

I am of opinion that there is no evidence to support the finding of negligence on the part of the defendants in not providing proper inspection, whatever the character of the inspection. There was nothing to shew that their shops and their works were insufficiently or inefficiently manned or operated, or that they did not take all of the usual precautions taken by companies such as they are, or by others in any way like them, but the contrary. This particular locomotive seems to have been cared for with even more than an ordinary amount of cleaning and examination, apart from that examination and care which the engineer and fireman ought to have bestowed upon it; so that unless jurors are permitted to lay down new methods of conducting great undertakings and operations

about which they can hardly know anything, and in regard to which there is no evidence, this verdict cannot be given effect to. It has been said that the cobbler should stick to his last, and with quite as much force it might be said that neither Judges nor jurors should lay down rules altering the usual and approved method of carrying on the business of great undertakings, such as that in question, requiring new "systems of inspection" or other notions, to support a claim for damages. It was the jury's duty to find whether the accident was caused by any negligence of the defendants or any of their servants, and if so, what that negligence was. To say whether Jeffers was negligent, not to say that the defendants should or should not have had an inspector over him, and so, logically, over each of its thousands of workmen, and that no work of any of them should go into use until passed by an inspector. That no matter how skilled or how careful the workman or other servant, and no matter what his position, his work must be overseen by some "inspector." If, instead of employing the competent man which Jeffers is proved to have been, an incompetent man had been employed, and if his incompetence had caused the accident, a good cause of action would have arisen from negligence in the employment of incompetent servants, not from want of inspection. If a competent man such as Jeffers should negligently perform his work, as sometimes the most competent may, and if injury were caused by that negligence, an action would lie against him, and, under certain circumstances, against his employers; not on the ground of defective systems of inspection or want of proper inspection, but on the act of negligence itself. So, too, if there were negligence on the part of anyone concerned in the care of the engine.

Shortly stated my opinion is: (1) that the judgment cannot stand, because the finding as to "not providing proper inspection," is, (a), too indefinite, and (b) unsupported by any reasonable evidence; (2) that it cannot be supported at common law on the negligence of Jeffers, because (a) there is no finding that such negligence was the proximate cause of the accident, but there is at least an implied finding to the contrary; and because (b) the question of common employment was not presented and dealt with

at the trial; nor is there any reasonable ground for the contention, now for the first time made, that the case was not one of common employment; and (3) that no judgment can be entered for the plaintiff under the statute without usurping the functions of the jury, because (a) there is no finding by them that Jeffers's negligence was the proximate cause of the accident, and there is, by implication, a finding that it was not; and because (b) there is no finding that Jeffers was a person entrusted by the defendants with the duty of seeing that the condition of the machinery was proper. There was nothing like an admission, by the defendants, in any shape or form, which would supply the want of any such findings.

A judgment on any common law liability, therefore, cannot be sustained; and there are no findings sufficient to support a judgment under the Workmen's Compensation for Injuries Act. Indeed, such a judgment would be contrary to the findings, and the several times expressed determination of the jury. In my opinion, the defendants, therefore, as the case stands, are entitled to the judgment; but the case is a proper one for the exercise of the discretionary power to grant a new trial on the question of liability under the Act only, and that should be done.

CONSTITUTIONAL LAW—MECHANICS LIEN.

Ontario.]

[Divisional Court.

CRAWFORD V. TILDEN.

(13 O.L.R. 169).

*Constitutional Law—Mechanics' Lien Act—Railways—Dominion Act—
Railway Act, 1903, sec. 240.*

The Mechanics' and Wage Earners' Lien Act, R.S.O. 1897, ch. 153, does not apply to a railway company incorporated under a Dominion Act and declared thereby to be a company incorporated for the general advantage of Canada.

THE plaintiff took proceedings under the Mechanics' Lien Act against Tilden & Co., M. A. Piggott & Co., and the Guelph and Goderich R.W. Co. to enforce a wage earner's lien, and the matter was heard before CLUTE, J., at the non-jury sittings at Goderich, on 7th May, 1906.

E. L. Dickenson, for the plaintiff.

W. Proudfoot, K.C., for the defendants M. A. Piggott & Co.

A. H. Macdonald, K.C., for the defendants the Guelph and Goderich R.W. Co.

The defendants Tilden & Co. appeared in person.

The work was done for Tilden & Co., who were sub-contractors under M. A. Piggott & Co., who had a contract for the earth work, cutting and grubbing, etc., required in the building of a portion of the railway within the county of Huron.

There were 100 similar liens which were brought before the Court by this action.

The liens were filed in the registry office of the county of Huron.

The Guelph and Goderich R.W. Co. was a company incorporated under the Dominion Act, 4 Edw. VII. ch. 81 (D.), and was declared to be a work for the general advantage of Canada. The charter was for the building of a line of railway from the city of Guelph to the town of Goderich, and which had been leased for a long term of years to the Canadian Pacific R.W. Co.

Piggott & Co. had been paid for the work done under their contract, except the 10 per cent. retained in the monthly certificates.

It was argued on behalf of the railway company that the company being a railway incorporated under a Dominion Act, and declared to be for the general advantage of Canada, was under the exclusive jurisdiction of the Dominion, and therefore the "Mechanics' and Wage Earners' Lien Act," R.S.O. 1897, ch. 153, being a Provincial Act, did not apply to it.

The following judgment was delivered by the learned Judge.

May 7th, 1906. CLUTE, J.:—A preliminary objection has been made by Mr. Macdonald, as counsel for the Guelph and Goderich R.W. Co., that this railway is a Dominion railway, under the exclusive jurisdiction of the Dominion Parliament, and that the Mechanics' Lien Act can have no application to a railway of this kind.

That has raised a very difficult question, and I am of the opinion that the objection at this stage is not well taken.

Section 52 of the Mechanics' Lien Act provides that the provisions of the Act, so far as they could affect railways under the control of the Dominion of Canada, are only intended to apply so far as the Legislature has jurisdiction thereto.

The Mechanics' Lien Act has relation not to railways, or any particular railway, whether under the Dominion or Provincial Act, but it has primarily relation to the collection of wages of workmen and incidentally as the Act now is, after the amendment, it now covers railways, and unless the objection here is well taken, it covers all railways. The lien which is spoken of is only one incident of the Act. Provision is made under the various sections of the Act for working out a claim in favour of the workmen—of the wage earner, by directing that a certain portion of the contract price, varying from fifteen to twenty per cent., according to the amount of the contract, be set apart as a special trust fund to meet the obligations of the contractor to his men. That is entirely apart from the manner of realizing the lien in case that is not done.

It may be that there will be no necessity to proceed against the railway at all. It may be in the present case that this sum which has been contracted to be set apart, is set apart, and that the provisions of the Act may be entirely carried out according to its intent and meaning, that the necessity of sale of the lands at all will not be needed, and therefore in this limited sense the Ontario Legislature may well have authority to have enacted the various sections of the Mechanics' Lien Act to this extent.

I refer to the language of Lord Watson in the case of the *Attorney-General of Canada v. Attorney-General of Ontario*, [1898] A.C. 247, where he says: "In their Lordships' opinion these considerations must be borne in mind when interpreting the words 'bankruptcy' and 'insolvency' in the British North America Act. It appears to their Lordships that such provisions as are found in the enactment in question, relating as they do to assignments purely voluntary, do not infringe on the exclusive legislative power conferred upon the Dominion Parliament. They would observe that a system of bankruptcy legislation may frequently require various ancillary provisions for the purpose of preventing the scheme of the Act from being defeated. It may be necessary for this purpose to deal with the effect of executions and other matters which would otherwise be within the legislative competence of the Provincial Legislature. Their Lordships do not doubt that it would be open to the Dominion Parliament to deal with such matters as part of a bankruptcy law, and the Provincial Legislature would doubtless be then precluded from interfering with this legislation inasmuch as such interference would affect the bankruptcy law of the Dominion Parliament. But it does not follow that such subjects, as might properly be treated as ancillary to such a law and therefore within the powers of the Dominion Parliament, are excluded from the legislative authority of the Provincial Legislature when there is no bankruptcy or insolvency legislation of the Dominion Parliament in existence."

Now there can be no doubt in the present case that the collection of wages of employees is a matter of civil right within the jurisdiction of the Provincial Legislature. It is true that in enforcing

that right under the Mechanics' Lien Act it may be necessary to reach property which is under the control of the Dominion Parliament and in such case, where the Dominion Government has not passed any Act making provision for the collection of any debts due to a workman from a Dominion railway, I think that the discretion referred to by Lord Watson is applicable to this case, and until there is such legislation, that the Provincial Legislature had power to pass the enactment they have passed.

But it is said, it is against public policy to sell a railway and that the amendment of the Mechanics' Lien Act which introduced the word "railway" did not alter the law in that regard. I am not of this opinion. I think the Dominion Railway Act, 1903, sec. 240, and the decisions in the case of *Redfield v. Corporation of Wickham* (1888), 13 App. Cas. 467, and *Canada Southern R.W. Co. v. Jackson* (1890), 17 S.C.R. 316, shew that a Dominion railway or a section of it may be sold. In other words, the highest court, the court of Parliament, has settled the rule in regard to selling the railway or a portion of it, for the satisfaction of a public debt. So also, *Wile v. Bruce Mines and Algoma R.W. Co.* (1906), 7 O.W.R. 157. Then without deciding, it may be said there is a further view to be considered according to the finding of the Master in respect of this land, that there may be no necessity for the sale at all. There may be ample fund set aside by the Act for the very purpose of meeting this claim. I feel that we may, at the present, assume there may be moneys, which may be reached by the appointment of a receiver or by sequestration upon the findings of the Master, so as to make it unnecessary to effect a sale.

At all events, I think the preliminary objection at this stage is not well taken, and the plaintiff may proceed with his evidence and shew that he is entitled to a lien.

At the conclusion of the case he further said:—

The plaintiff has made out a case for a reference in this matter to ascertain the amount due the plaintiff, and the amounts due other lien holders, and for a right to rank on the funds, pursuant to the Act, for the amount due by the owners. I refer it to the Master at Goderich, and the Master may take all necessary accounts,

and make all necessary enquiries and report as to the liabilities of the defendants and each of them, and the various lien holders under the terms and pursuant to the Mechanics' Lien Act. Further directions and costs reserved, including the costs of the trial, when the Master shall make his report.

After some observations by counsel the learned Judge added:—

I intend that the Master should have the widest scope in making the enquiry as to the relation existing between these defendants and any one of them, as to the amount due by the one to the other that may be made applicable to the payment of these claims or any of them.

From this judgment the railway company appealed to a Divisional Court.

On October 11th, 1906, the appeal was heard before **BOYD, C.**, **MAGEE**, and **MABEE, JJ.**

E. D. Armour, K.C., for the appellants.

E. L. Dickenson, for the plaintiff, respondent.

A. M. Stewart, for the defendants **Piggott & Co.**, respondents.

The arguments and authorities referred to sufficiently appear from the judgments.

November 5, 1906, **BOYD, C.**:—Apart from special statute, the law of Ontario still is that a railway as a going concern cannot be sold under execution by the sheriff unless he is able to sell the whole undertaking. It is not competent under judicial process of this kind to sell by piecemeal so as to disintegrate the road. That was recognized as the law by the Privy Council when deciding in *Redfield v. Corporation of Wickham*, 13 App. Cas. 467, at pp. 473, 5-6 that a railway undertaking might be as a whole sold under execution, according to the proper construction of the Dominion old law.

For like reasons that make against the sale of part of a railway under execution, it was held that a mechanics' lien against part of

a railway could not be enforced in Ontario in *King v. Alford* (1885), 9 O.R. 643. And that was the state of the law when the Mechanics' Lien Act was amended by extending it in terms to railways. But the machinery supplied by the Act does not provide for working out a sale of the entire undertaking. The remedy seems to be restricted to that part of the railway where the work was done, and if the right of relief to the wage-earner in respect of his lien was analogous to that enjoyed by a vendor of land in right of the lien for the price, relief might be given and worked out by the Court under the provisions of the Provincial Act.

But we are precluded by the decision in *King v. Alford* from holding that the mechanics' lien is of like legal character with a vendor's lien. It was there held that the mechanics' lien was operative as a statutory lien arising in process of execution of efficiency equal to, but not greater than, that possessed by ordinary writs of execution.

Under a writ of execution against lands the sheriff can only sell what is in his bailiwick and this limited process is not applicable to a sale of a line of railroad running through many counties of the Province.

Even if the mechanics' lien was to be regarded as a vendor's lien, I question the competence of the Province to put that burden upon the lands and property of a federal railway undertaking.

By Dominion statute 4 Edw. VII. ch. 81, the railway in question was incorporated and the undertaking was declared to be by sec. 11 a work for the general advantage of Canada. By the enactment it was brought within the exception as to the local works and undertaking specified in the British North America Act, sec. 92, sub-sec. 10 (c), and thereby placed under the exclusive legislative authority of Canada by virtue of sec. 91, sub-sec. 29. Being thus a federal railway exclusively under the legislative control of the Dominion, it is not competent for the local legislature of Ontario to enact any law which would derogate from the status and rights and property enjoyed and held by the federal corporation under its constitution created by the Dominion of Canada. That result follows inevitably, I think, from what has been decided in the earlier case

of *Bourgoin v. La Compagnie du Chemin de fer de Montreal, Ottawa et Occidental R.W. Co.* (1880), 5 App. Cas. 381; and the more recent case of *Attorney-General of Canada v. Attorney-General of Ontario* [1898] A.C. 247; *Canadian Pacific R.W. Co. v. Notre Dame de Bonsecours*, [1899], A.C. 367; *Madden v. Nelson and Fort Sheppard R.W. Co.*, *ib.* 626.

The Mechanics' Lien Act of Ontario is extended to railway companies as owners and to railways and their lands with the safeguard in sec. 52. "The provisions of this Act so far as they affect railways under the control of the Dominion of Canada are only intended to apply so far as the Legislature of the Province has authority or jurisdiction in regard thereto." This was passed in 1886, after the decision in *King v. Alford* (1885).

The effect of the legislation is to operate at once upon the property of the railroad affecting it *in rem* and creating a statutory lien on the undertaking for the benefit of the wage earner. The initial proceedings under the Ontario Act is to place a burden on the lands of the railroad in addition to what may be imposed upon them under the Dominion Railway Act, secs. 111, 112, etc., Act of 1903. That appears to me to be a piece of legislation beyond the competence of the Provincial Legislature.

I foresee besides great difficulty in working out the provisions of the Mechanics' Lien Act as applied even to Ontario railways under the existing law, which forbids the disposal of a railway piecemeal. To make the local law effective it would appear to be requisite to provide for a sale of the particular part of the land benefitted by the work in respect of which a lien is given. The Act as it stands at present can only be worked out by attributing the lien to all the line of railway lands and selling the whole as an entire thing while yet the lien is registered only in the county where the work has been done: sec. 17, sub-sec. 3, and sec. 7.

Upon the main point, however, as to the constitutional aspect of the Mechanics' Lien Act, I think the appeal should succeed. It is not a question for costs.

It was suggested, but not strongly argued, that there might be a difference when the federal railroad was not a completed and run-

ning concern, but only in course of construction. That, however, is not to my mind an essential difference; it is still a federal work entered upon and being prosecuted for the advantage of the whole Dominion, and it should not be frustrated or interfered with by Provincial legislation of the kind in question.

MABEE, J.:—The Guelph and Goderich R.W. Co., incorporated under 4 Edw. VII. ch. 81 (D.), is declared to be a work for the general advantage of Canada.

The plaintiff took proceedings under the Mechanics' Lien Act, and has a declaration that he is entitled to a lien, under that Act, upon the lands of the defendants the railway company, "in the county of Huron," and to a charge upon the amount directed by sec. 11 of the Act to be retained by the defendants Piggott & Co. and the railway company under the contracts in question, and a reference to the Master at Goderich to take accounts, etc. The proceedings were commenced by filing the lien in the registry office for the county of Huron, and then by service of statement of claim as the Act provides. The judgment, it will be observed, does not make provision for the sale of the lands covered by the lien, or of the road as a whole, and it is contended that under this judgment declaring the lien upon the railway lands in Huron the whole line of railway running through several counties can, if necessary, be sold under the direction of the Master; this seems rather a startling proposition, but if the lien is to be of any avail to the plaintiff, it must be by sale of the road.

The cases of *King v. Alford*, 9 O.R. 643, and *Breeze v. Midland R.W. Co.* (1879), 26 Gr. 225, are authorities that the Mechanics' Lien Act, as it then stood, had no application to railways, but since these decisions the Act has been amended, and the question is whether this amendment has in any way advanced or enlarged the rights of persons seeking the aid of the Act to enforce their supposed liens against the undertakings of railways under the exclusive control of the Dominion Parliament.

The plaintiff's statement of claim asks relief only as to such lands of the railway company as are in the county of Huron. The

company is authorized to construct a road running through several counties, and under the judgment in appeal it is difficult to see how, in any event, the Master could direct a sale of lands other than those upon which the lien was declared to exist, and it being clear that the railway could not be sold piecemeal, the learned counsel for the plaintiff contended that he was entitled to a declaration of lien upon the railway "in respect of which the work was performed," and the case was so argued. Under secs. 91 and 92 of the British North America Act, legislative jurisdiction over the railway is vested exclusively in the Dominion Parliament, and I do not think that the Legislature of Ontario has power to enact provisions providing for a lien of the sort mentioned in the Act attaching to the lands of this railway and for a sale of the railway in default of payment.

If the plaintiff had an execution in the hands of the sheriff of Huron he could not sell this railway either in whole or in part under that process.

The British Columbia Mechanics' Lien Act has been held inapplicable to a railway subject to Dominion jurisdiction: *Larsen v. Nelson and Fort Sheppard R.W. Co.* (1895), 4 B.C.R. 151.

I think the difficulties pointed out in *King v. Alford* still exist, and no reasons are apparent for supposing the Legislature intended aiming the amendment at railways not under their legislative control, as there are many railways that the Act might be operative as to, such as an electric or steam road operating in one county under an Ontario charter, or special Act of the Province.

I think the judgment must be set aside and the appeal allowed.

MAGEE, J., concurred.

NOTE.

The decision of the Divisional Court in this case is in accordance with the general line of decisions holding that provincial legislation cannot have the effect of creating rights which may interfere with the physical condition of a work which has been declared to be for the general advantage of Canada. The subject has been discussed in Canadian Railway Act (Annotated), pages 27, 28, *et. seq.*

EXPRESS COMPANY—CONDITION LIMITING
LIABILITY.

Ontario.]

[Divisional Court.

F. T. JAMES CO. v. DOMINION EXPRESS CO.

(13 O.L.R. 211).

Carriers—Express Company—Contract to Forward Perishable Goods—Delay in Transmission—Gross Negligence—Railway Company—Agent or Servant—Notice of Claim for Damage to Goods—“At this Office.”

The defendants undertook to forward a consignment of fish from Selkirk, Manitoba, to Toronto, Ontario, subject to certain conditions expressed in the contract :—

Held, that the defendants' engagement implied that a safe and rapid transit would be furnished for the whole distance, and that contract was broken when the perishable goods were transferred to a freight train at Winnipeg, by which delivery was delayed; and this was negligence for which the defendants were liable as common carriers.

A special condition that the defendants should not be liable for loss or damage, unless it should be proved to have occurred from the gross negligence of the defendants or their servants, did not avail the defendants, because the railway companies employed by the defendants for the transaction of their business were to be regarded as the defendants' servants, and the negligence was to be accounted gross negligence.

Another condition was that a claim for loss or damage should be presented to the defendants in writing “at this office:”—

Held, that presentation at the head office of the defendants satisfied this requirement.

Judgment of Clute, J., affirmed.

APPEAL by the defendants from the judgment of Clute, J., at the trial, at Toronto, in favour of the plaintiffs with costs upon their claim for damages for injury to goods by delay in transportation, and dismissing the defendants' counterclaim for express charges with costs.

The plaintiffs by their statement of claim alleged:—

3. That on or about the 10th October, 1903, the plaintiffs by their agents, the Imperial Fish Co., delivered to the defendants as carriers at Selkirk, Manitoba, 274 boxes of fish contained in two cars, numbered respectively C.P.R. 81512 and C.P.R. 80146, to be by the defendants safely carried to Toronto by express, and there promptly and within reasonable time delivered to the plaintiffs.

4. That the defendants received the boxes of fish in good condition, and undertook to transmit the same by express to the

plaintiffs at Toronto, and were aware when they received the fish of their perishable nature and of the necessity for prompt and expeditious transmission and delivery thereof.

5. That the defendants did not transmit the boxes of fish from Selkirk to Toronto by express, but for a great part of the way negligently transmitted the fish, or authorized or allowed it to be transmitted, by freight, and neglected to re-ice the fish or otherwise properly care for them, and in consequence of the defendants' neglect the fish were delayed in transmission, and became stale and worthless to the plaintiffs.

6. That had the fish been forwarded by express, as the defendants undertook to forward them, they would have reached Toronto on the 13th October, but in consequence of the negligence of the defendants the fish were not delivered to the plaintiffs until the 16th October, 1903.

7. That upon delivery of the fish to the plaintiffs, the plaintiffs refused to accept the same, owing to their damaged condition, and so notified the defendants, whereupon the defendants, by their agent, examined the fish and admitted that they were spoiled, and requested the plaintiffs to take the same and dispose thereof to the best advantage possible.

8. That the plaintiffs, in compliance with such request, received the fish from the defendants and disposed thereof at the best price obtainable therefor, namely, \$914.70.

9. That the defendants, since the receipt of the fish, have demanded from the plaintiffs payment of \$862 for express charges for the carriage thereof, but the plaintiffs have refused to pay the same, and say that they are not liable therefor.

10. That by reason of the neglect of the defendants and their failure to carry the fish by express and to deliver the same to the plaintiffs with reasonable despatch, the plaintiffs have suffered damage to the extent of \$1,662, but, after crediting the amount realized for the fish, at the defendants' request, the plaintiffs claim \$1,041.31, made up as follows:—

To invoice price of fish	\$1,662.00
To express and duty on 124 boxes to Buffalo	198.61
To labour and salt on same	36.70
To express and duty on 20 boxes to New York	58.70
	<hr/>
	\$1,956.01
By amount realized on fish sold	914.70
	<hr/>
	\$1,041.31

The defendants by their statement of defence alleged:—

2. That they were not common carriers of fish.

4. That they did not agree to carry any fish for the plaintiffs and that any agreement to carry the fish in question, if made, was made with the Imperial Fish Company, and the plaintiffs have no cause of action, and their action fails for want of parties.

5. That if the defendants agreed to carry the fish, the contract of carriage was made subject to the terms and conditions set out in a certain shipping bill or bill of lading, wherein the defendants agreed with the Imperial Fish Company, the consignors, that the defendants should not be held liable for any loss or damage except as forwarders only, and the loss, if any, in question was not due to any breach of contract, neglect, or default of the defendants in their capacity of forwarders.

6. That the plaintiffs also agreed in the said contract that the defendants should not be liable for any default or negligence of any person, corporation, or association to whom the property should or might be delivered by the defendants, etc., as in the contract.

7. That the defendants did not themselves undertake or purport to carry the fish, but carried the same only upon the various railway lines lying between the point of shipment and the city of Toronto, part of the carriage being performed by the Canadian Pacific Railway Company, and part by the Grand Trunk Railway Company, and the delay or negligence, if any, was not due to the defendants, but was due to one or other of the companies aforesaid, and occurred while the goods were off the established routes or lines run by the defendants.

8. That it was further agreed by the said contract that the defendants should not be liable for any damage to the property in question caused by the detention of any train of cars, and, if there was any loss or damage, it was due to the detention of the cars while the same were upon the lines of one of the companies aforesaid.

9. That it was further agreed by said contract that the defendants should not be liable for any loss or damage to the property in question unless it should be proved to have occurred from the fraud or gross negligence of the defendants or their servants, and the loss or damage, if any, was not due to such cause.

10. That it was further agreed by said contract that the defendants should not be liable for the fish unless the same were properly packed and secured for transportation, and the same were not so packed and secured, nor were they iced, nor was any means taken properly to preserve them during the journey, and the loss or damage, if any, was due to the failure of the plaintiffs or their agents to comply with this term of the contract.

11. That it was further agreed by the said contract that the defendants should in no event be liable for any loss or damage, unless the claim therefor should be presented to them in writing at their office at Selkirk, Manitoba, within 90 days from the date of the contract, in a statement to which the said contract should be annexed, and the plaintiffs failed to file any claim or to make any claim in writing in accordance with the terms of such contract.

12. That if the defendants received the fish at all, the same were carried by them with due diligence and care and in exact fulfilment of their duties, if any, to the plaintiffs, and the defendants denied that they were in any way negligent or that the fish suffered any damage whatever through or owing to the detention of cars or delays while in the custody of the defendants.

13. That if the fish were not in good condition when they arrived, any loss arising therefrom was due to the fact that they were not in proper condition when they were delivered to the defendants for carriage.

The defendants also counterclaimed \$862 for the carriage of the goods from Selkirk to Toronto.

In reply the plaintiffs alleged:—

1. That if, by reason of the terms of the agreement referred to in the 5th paragraph of the defence, the defendants would not be liable for the damage claimed by the plaintiffs, nevertheless the defendants had waived their rights under that agreement by the subsequent agreement referred to in the 7th paragraph of the statement of claim, and were estopped from setting up the first agreement.

2. That if the fish were carried off the established routes or lines run by the defendants, they were so carried by reason of the negligence of the defendants.

3. That if the damage complained of by the plaintiffs occurred while the fish were upon the lines of one of the railway companies mentioned in the 8th paragraph of the defence, such railway company was the agent of the defendants, and the defendants were responsible therefor.

4. That full particulars in writing of the plaintiffs' claim were furnished and delivered to the defendants within 90 days from the date of the agreement.

5. That because of the failure of the defendants to carry out their contract with the plaintiffs and to discharge their duty as carriers of the fish, the plaintiffs were not liable to the defendants in any sum whatever for the carriage thereof.

The contract referred to in the statement of defence was in part as follows:—

“Negotiable.

“The Dominion Express Company, Limited.

“Received from Imperial Fish Company of Selkirk the under-mentioned articles, which we undertake to forward to the nearest point to destination reached by this company, subject expressly to the following conditions, namely:—

“This company is not to be held liable for any loss or damage except as forwarders only, nor for any loss or damage by fire, by the dangers of navigation, by the act of God . . .

"Nor shall the company be liable for any default or negligence of any person, corporation, or association to whom the below described property shall or may be delivered by this company, for the performance of any act or duty in respect thereto at any place or point off the established routes or lines run by this company, and any such person, corporation, or association is not to be regarded, deemed, or taken to be the agent of this company for any such purpose, but, on the contrary, such person, corporation, or association shall be deemed and taken to be the agent of the person, corporation, or association from whom this company received the property below described.

"It being understood that this company relies upon the various railroad and steamboat lines of the country for its means of forwarding property delivered to it to be forwarded, it is agreed that it shall not be liable for any damage to said property caused by the detention of any train of cars or of any steamboat upon which said property shall be placed for transportation, nor by the neglect or refusal of any railroad company or steamboat to receive and forward the said property.

"It is further agreed that this company is not to be held liable or responsible for any loss of or damage to said property, or any part thereof, from any cause whatsoever, unless in every case the said loss or damage be proved to have occurred from the fraud or gross negligence of said company or its servants; nor in any event shall this company be held liable or responsible nor shall any demand be made upon them beyond the sum of \$50, at which sum said property is hereby valued, unless the just and true value thereof is stated herein; nor upon any property or thing unless properly packed and secured for transportation. . . .

"In no event shall this company be liable for any loss or damage unless the claim thereof shall be presented to it in writing at this office within 90 days from this date, in a statement to which this receipt shall be annexed.

"And it is also understood that the stipulation contained herein shall extend to and enure to the benefit of each and every company

or person to whom, through this company, the below described property may be intrusted or delivered for transportation.

"The Dominion Express Company, Limited, assumes no liability for delays, losses, or non-delivery beyond their lines.

"Deliveries at all points reached by this company are only to be made within the delivery limits established by this company at such points at the time of shipment, and prepayment in such cases shall only cover places within delivery limits.

"The party accepting this receipt hereby agrees to the conditions herein contained.

"Date—October 10th, 1903.

"Articles—134 boxes fresh fish 19,600.

"Value—\$800.

"Consignee—F. T. James Coy.

"Destination—Toronto.

"Receipted by—George Robinson.

"C.P.R. Refrigerator No. 81512, *via* Smith's Falls.

"Date—October 10th, 1903.

"Articles—140 boxes fresh fish 21,000.

"Value—\$805.

"Consignee—F. T. James Coy.

"Destination—Toronto.

"Receipted by—George Robinson.

"C.P.R. Refrigerator No. 80146, *via* Smith's Falls."

At the trial the plaintiffs confined their claim to one of the carloads of fish.

The appeal was heard by a Divisional Court composed of BOYD, C., MACLAREN, J.A., and MABEE, J., on the 9th January, 1907.

Wallace Nesbitt, K.C., and *Shirley Denison*, for the defendants, appellants. What is the relation of an express company to a customer? We say the company are merely the agents of the customer to forward his goods, not forwarders, but in a position similar to tourists' agents. See *Kennedy v. American Express Co.* (1895), 22 A.R. 278, 284; 12 Am. & Eng. Encyc. of Law, 2nd ed., p. 548, note (6). No doubt, there is a higher duty in the case of perishable

goods; the undertaking is to get the goods to their destination as expeditiously as possible, but not by any particular time, unless it is so specified in the contract. See *Taylor v. Great Northern R.W. Co.* (1866), L.R. 1 C.P. 385; *Northern Pacific Express Co. v. Martin* (1896), 26 S.C.R. 135; *Moore v. Harris* (1876), 1 App. Cas. 318. "This office" in the contract means the Selkirk office, where the contract was made. Upon the proper construction of the contract, the defendants are absolved from liability for the delay. See *Duckworth v. Lancashire and Yorkshire R.W. Co.* (1901), 84 L.T.N.S. 774; Hutchinson on Carriers, sec. 769; *Northern Transportation Co. v. McClary* (1872), 66 Ill. 233, 237; *Caledonian R.W. Co. v. Muirhead's Trawlers Limited* (1904), 41 Sc.L.R. 418. The defendants should be allowed the express charges counter-claimed for.

G. F. Shepley, K.C., and G. H. D. Lee, for the plaintiffs, referred to *Smith v. Whiting* (1834), 3 C.B.O.S. 597, and *Johnson v. Dominion Express Co.* (1896), 28 O.R. 203, to shew that the defendants are common carriers; and to *Fitzgerald v. Grand Trunk R.W. Co.* (1880-1), 4 A.R. 601, 5 S.C.R. 204, as to the want of precision in the contract; and contended that the defendants were liable for the delay.

Nesbitt, in reply, cited *Anderson v. North British R.W. Co.* (1875), 2 Rett. 443; *McConnachie v. Great North of Scotland R.W. Co.* (1875), 3 Rett. 79.

January 15, 1907. The judgment of the Court was delivered by *BOYD, C.*:—The engagement of the express company, which is an undertaking to forward to the nearest point to destination, implies that a safe and rapid transit will be furnished by the company for the whole distance, and that contract was broken when the perishable goods were transferred to a freight train at Winnipeg, by which delivery was delayed beyond the proper time, according to the usual method of transmission by fast train. Negligence is attributable to this deviation from the usual and proper method of forwarding the goods. The defendants are common carriers, and are liable as such for acts of negligence: *Martin v. Great Indian Peninsular R.W. Co.* (1867), L.R. 3 Ex. 9.

The special clause in the receipt, that the company shall "not be liable for loss or damage for any cause whatever, unless it be proved to have occurred from the . . . gross negligence of the company or its servants," does not help the situation. According to well settled rules of liberal construction in these carriers' cases, the agencies they employ for the transaction of their business (whether independent lines of railway or not) are all accounted employees, agents, or servants of the contracting company. Every person who, directly or indirectly, is employed by a company as a carrier to do that which the company have engaged to do by themselves or others under them, is a *servant*. That principle of construction was laid down as early as 1848 in *Machu v. London and South Western R.W. Co.* (1848), 2 Ex. 415, upon a statute which is *in pari materiâ* with the language of this contract; and that canon has been recognized as of authority in the subsequent cases: see *Stephens v. London and South Western R.W. Co.* (1886), 18 Q.B.D. 121, 124. It is adopted as expressive of the law in the latest compilation of law in the United States: see 6 Cyc. p. 369.

What occurred in this case in the handling of the fish cars was "gross negligence," as defined by the Courts—meaning that want of reasonable care, skill, and expedition which may properly be expected: see *Beal v. South Devon R.W. Co.* (1864), 3 H. & C. 337.

The alleged want of notice at the local office should not prevail: the language is not clear as to what is meant by "at this office." It is amply satisfied, so far as the practical and substantial information as to the loss is called for, by communicating with the head office of the company. The right of recovery should not be defeated on this narrow ground, having regard to the ambiguity of the terms: *Miles v. Haslehurst* (1906), 23 Times L.R. 142.

The right on the counterclaim to recover for the express charges on the other car of damaged fish may well be left for discussion when the question is agitated as to the right to recover for that damage. I agree that the counterclaim as to this should be dismissed without costs and without prejudice to its recovery against the proper party.

The judgment should be affirmed with costs.

NOTES.

Since the facts in this case were considered, the statute 6 Edw. VII., ch. 42, sec. 27, has been passed bringing Express Companies under the jurisdiction of the Board of Railway Commissioners, and this section has been re-enacted in R.S.C. (1906), ch. 37, secs. 348 to 354. Under sec. 353 of the latter Act, "no contract, condition, by-law, regulation, declaration or notice, made or given by any company or any person or corporation charging express tolls, impairing, restricting or limiting the liability of such company, person or corporation with respect to the collecting, receiving, caring for or handling of any goods for the purpose of sending, carrying or transporting them by express, or for or in connection with the sending, carrying, transporting or delivery by express of any goods shall have any force or effect unless first approved by order or regulation of the Board." This section corresponds to the similar provision governing railway companies under section 340 of the same Act, formerly section 275 of the Act of 1903, and now no condition imposed by an express company and coming within the terms of this provision will be valid unless approved as provided by the Act. Accordingly express companies are not at liberty to handle goods upon their own terms as heretofore, but must obtain the approval of the Board to those terms. No new conditions have yet been approved by the Board but interim orders have been made by the Board under other provisions of the same statute approving of the forms of contracts and conditions employed by express companies at the time of passing of the Act; namely on the 13th day of July, 1906. The orders of the Board approving of these conditions are dated November 13th, 1906, and May 23rd, 1907, and are as follows:—

THE BOARD OF RAILWAY COMMISSIONERS FOR
CANADA
MEETING AT OTTAWA,
THURSDAY, THE 13TH DAY OF NOVEMBER, A.D. 1906.
Present:

HON. A. C. KILLAM,
Chief Commissioner,
DR. JAMES MILLS,
Commissioner.

IN THE MATTER OF

The application of the Canadian Express and the Dominion

Express Companies, under sec. 27 of 6 Edw. VII, ch. 42, entitled "An Act to amend the Railway Act, 1903," for the approval of forms of contracts.

Whereas, it was provided by sub-secs. 10 and 11 of sec. 27 of the Act passed in the sixth year of His present Majesty's reign, ch. 42, entitled, "An Act to amend the Railway Act, 1903," that "No contracts, conditions, by-laws, regulations, declaration, or notice made or given by any company, or any person, or limiting the liability of such company, person, or corporation charging express tolls, impairing, restricting, or limiting the liability of such company, person or corporation with respect to the collection, receiving, caring for, or handling of any goods for the purpose of sending, carrying or transporting them by express, or for or in connection with the sending, carrying, transporting, or delivery by express of any goods shall have any force or effect unless first approved of by Order or regulation of the Board," and that "In order to allow time for the companies, persons, and corporations to comply with the provisions of this section, all contracts, conditions, by-laws, regulations, declarations or notices within the meaning of sub-section 10 of this section lawfully in use at the time of passing of this Act may continue to be used and shall have effect until the first day of November, one thousand nine hundred and six, or until such later date as the Board may, by order in any case or by regulation, fix and allow."

AND WHEREAS, it appears to the Board proper that the time fixed by sub-section 11, aforesaid shall be extended for the period of six months from the first day of November, one thousand nine hundred and six.

IT IS ORDERED

That all contracts, conditions, by-laws, regulations, declarations, and notices within the meaning of sub-section 10 aforesaid, and lawfully in use at the time of the passing of the said Act, may continue to be used, and shall have effect until the first day of May, one thousand nine hundred and seven; provided that this regulation shall not have the effect of authorizing any company, person, or corporation, after approval of its tariffs of tolls by the Board under the provisions of the said Act, to contract or collect in or under any transaction or contract any express toll or tolls within the meaning of the said sec. 27

higher than the toll or tolls set out in the tariffs so approved applicable to such transaction or contract.

(Signed) A. C. KILLAM

Chief Commissioner,
Board of Railway Commissioners for Canada.

THE BOARD OF RAILWAY COMMISSIONERS FOR
CANADA

MEETING AT OTTAWA,

THURSDAY, THE 23RD DAY OF MAY, A.D. 1897.

Present:

HON. A. C. KILLAM,	Chief Commissioner,
HON. M. E. BERNIER,	Deputy Chief Commissioner,
DR. JAMES MILLS	Commissioner,

IN THE MATTER OF

The application of the Canadian Express and the Dominion Express Companies, under sec. 27 of 6 Edw. VII., ch. 42, intituled, "An Act to amend the Railway Act, 1903," for the approval of forms of contracts, and

IN THE MATTER OF

The application of the said Canadian Express and Dominion Express Companies to extend the time fixed by the Order of the Board, dated 13th November, 1906, authorizing the use of contracts, conditions, by-laws and regulations of the said companies until the first of May, 1907,

Upon the report of the Chief Traffic Officer of the Board—

IT IS ORDERED.

That the time fixed in the said Order of the Board of the 13th of November, A.D. 1906, be, and the same is hereby extended until the first day of August, 1907, subject to the terms and conditions in the original order, and subject to the proviso that no increase is made in the rates or tolls of the said Express Companies beyond those now in force.

(Signed)

A. C. KILLAM,
Chief Commissioner,
Board of Railway Commissioners for Canada.

RIGHT OF WAY.

Ontario.]

[Anglin J.]

TORONTO, HAMILTON AND BUFFALO R. W. CO. v. HANLEY.

(See 6 O.W.R. 921.)

Public Highway—Dedication—Temporary Road—Deed of Grant—Construction—Farm Crossings—Entrance Gates—Agreement to Provide—Right of Way.

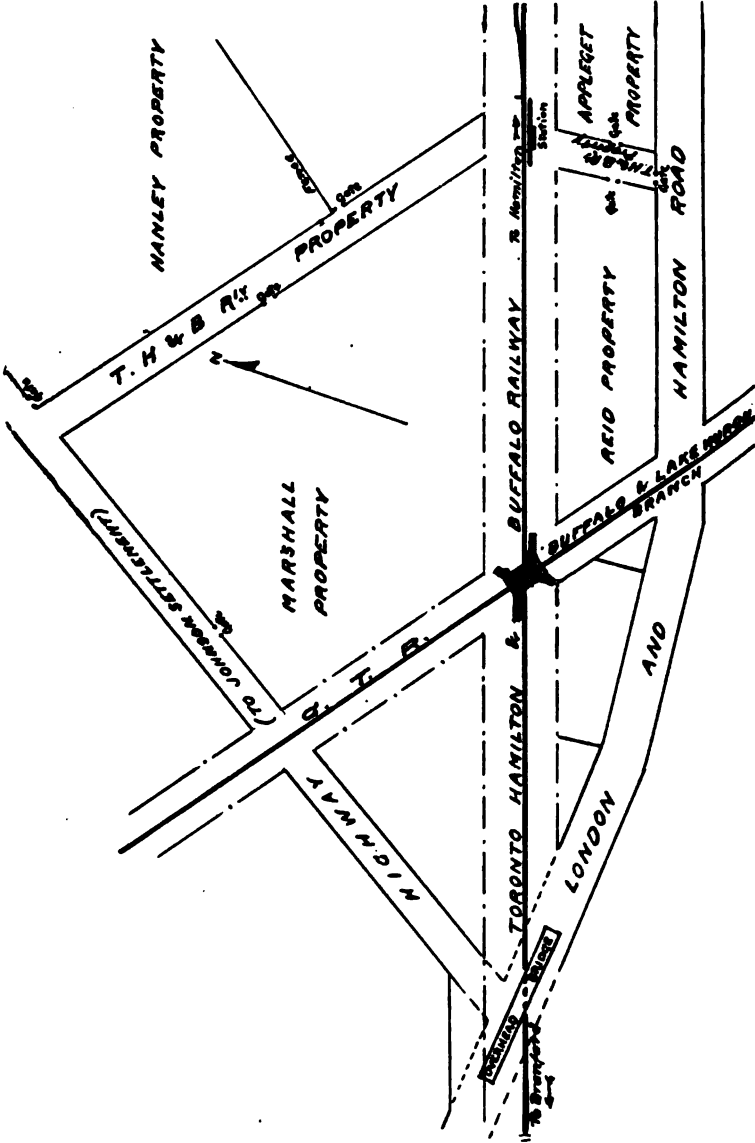
The plaintiffs constructed their railway through a quadrilateral parcel of land owned by one Smithson, the predecessor in title of the defendant.

By an agreement with Smithson, the plaintiffs acquired (for a temporary road) a strip of land crossing their tracks leading from the Hamilton road to the Johnson Settlement road, which was used as a diversion under section 183 of the Railway Act, 1888, while a bridge was being constructed to carry the railway over the Hamilton road and afterwards while repairs were being made. In the deed from Smithson the plaintiffs agreed to erect in lieu of farm crossings, four gates for entrances to the temporary road from the four parcels of land into which the original parcel had been sub-divided.

The plaintiffs closed that part of the temporary road leading from their right of way to the Johnson Settlement road and brought an action for an injunction restraining the defendant from trespassing upon it:—

Held, that the temporary road had not been dedicated as a highway, but that the defendant was entitled to a right of way over it to reach the Johnson Settlement road.

Action for injunction restraining defendant from trespassing upon lands of plaintiffs, and for damages. Defendant alleged that the lands in question, marked "T.H. & B. Ry. property," on the accompanying plan, were a highway, or in the alternative that he was entitled to a right of way over them, and counterclaimed a declaration of his rights in respect thereof.



The case was tried at Brantford on 3rd October, 1905, and the argument took place at Toronto on 2nd December, 1905.

H. Carscallen, K.C., for the plaintiffs.

W. T. Henderson, for the defendant.

DECEMBER, 13 1905. ANGLIN, J.:—Prior to the building of plaintiffs' railway, one Smithson owned a quadrilateral parcel of land bounded on the South by the Grand Trunk Railway, on the West by the Johnson Settlement road, on the North by other private property, and on the East by a tier of village lots lying between it and the Hamilton road. Smithson had uninterrupted access from any part of this quadrilateral parcel to the Johnson Settlement road.

In or about the year 1894 the right of way of plaintiffs' railway was laid out through this property, running approximately from South-West to North-East. This right of way intersected the Southern boundary formed by the Grand Trunk Railway, and left a considerable part of Smithson's land lying to the South-East without access to any highway. The tier of lots to the East lay between this part of the Smithson farm and the Hamilton road; the Grand Trunk Railway shut it in on the South; plaintiffs' railway on the North-West; and the adjoining private property on the North or North-East.

In the course of construction of plaintiffs' railway, it became necessary or expedient to carry over it by a bridge, the Hamilton road. In October, 1894, plaintiffs bought from Smithson the lands in question in this action, in order, they allege, to provide a temporary roadway in lieu of the Hamilton road leading over their tracks, while the latter road was obstructed by the works in connection with the erection of the bridge by which it is carried over their railway. The grant from Smithson is of two parcels; one a strip fifty feet wide leading through his lands lying to the North-West of plaintiffs' railway, from their right of way to the Johnson Settlement road; the other leading through his lands to the South of the railway, from the right of way Southerly to the rear of the tier of village lots fronting on

the Hamilton road, Smithson's lands, originally a single quadrilateral parcel, were thus divided by plaintiffs' railway, and the strips of land so acquired by plaintiffs from him, into four distinct parcels, two of which—those to the South-East of the right of way—were cut off from all access to any highway. By conveyance from another person, plaintiffs acquired the village lot fronting on the Hamilton road necessary to prolong the strip acquired from Smithson to the South of their right of way, Southerly to the Hamilton road. They had thus a complete passage or way from the Hamilton road to the Johnson Settlement road, upon their own lands leading across their right of way and tracks.

This land was used as a temporary road during the original construction of the bridge, and again in 1898 when repairs were being done. The Southern part has been used as a passage or entrance from the Hamilton road to plaintiffs' station, which is now situated at the point where that part of the lands acquired from Smithson lying South-East of plaintiffs' railway tracks meets their right of way. A gate is maintained at the entrance to this strip of land from the Hamilton road. The North-Western strip has, except when in use as a temporary road, been fenced off from plaintiffs' right of way by a wire fence, and some attempts appear to have been made at intervals to maintain a partial fence at the point where this latter strip meets the Johnson Settlement road.

There is not at all enough evidence, in my opinion, to support the allegation of dedication of these lands for a highway. The deed to plaintiffs suggests nothing of the kind; and the acts relied upon as evidence of dedication, so far as they effect the position of plaintiffs, are, I think, fully explained by the use of these strips of land for the temporary turning or diversion of the highway required by sec. 183 of the Railway Act of 1888.

Under conveyance from Smithson or his representatives or assigns, the four parts into which his property was divided

as above stated, have passed into the hands of several owners. The South-Eastern part belongs to one Reid; the North-Eastern part to one Appleget. These parcels lie to the South-East of the plaintiffs' right of way. The South-Western part belongs to one Marshall, and the North-Western part to the defendant Hanley.

When plaintiffs' railway was constructed, and they acquired the strips of land purchased from Smithson, it is conceded that, but for the arrangement I am about to refer to, he would have become entitled to two farm crossings over the railway, one to connect what is now the Reid part with the Marshall part of his farm; the other to connect the Appleget part with the Hanley part. But in his deed-poll to plaintiffs, Smithson inserted the following clause: "And the company agrees to erect four gates for entrances to the lands of the said Smithson adjoining the lands hereby conveyed, such gates to be in lieu of any farm crossings to which the said Smithson may be entitled."

Pursuant to this arrangement the company erected two gates, one on either side of the Southerly strip bought from Smithson, approximately opposite one to the other, and giving access from that strip of land to what are now the Reid and Appleget lots respectively. On the sides of the strip running North-Westerly from their right of way, they also built two gates, which are by no means opposite the one to the other. That on what is now the Hanley side is much further South, and affords entrance into a field, which, it is said, has always been separated by a fence from the other field comprised in Hanley's farm, and fronting on the Johnson Settlement road.

For plaintiffs it is contended that these four gates were intended merely to give Smithson access from one part of his lands to the other, and that the right to have them maintained and to use in connection with them the strips of land which were acquired by plaintiffs, ceased when the several parcels of land on either side passed into different hands.

Having regard to the surrounding circumstances; to the fact that Smithson's lands were entirely cut off from the Hamilton road; that plaintiffs' railway cut off two parcels of them

(Reid's and Appleget's) from any road; that the gates in the Marshall and Hanley farms, as erected by plaintiffs, are not one opposite the other; that the Hanley farm was always divided into two fields, separated by a fence; that the words of the agreement are not "for access from one part of Smithson's lands to the other," but are "for entrance to the lands of Smithson adjoining the lands conveyed." I cannot construe these words as giving to Smithson as owner of such adjoining lands, and to his successors in title thereto, anything less than a right to use such gates for entrance from the highway to his several parcels of land upon the respective boundaries between which and plaintiffs' land such gates were placed by plaintiffs: *Haggerty v. Lee*, 54 N.J.L. 580, 50 N.J.Eq. 464. To make the gates so available, there must be implied the grants by plaintiffs or the reservation by Smithson of rights of way over and upon the strips of land granted to plaintiffs leading from the highway—the Johnson Settlement road—to these several gates: *Gale on Easements*, 7th ed., p. 464. These rights of way existed not as easements in gross but an appurtenant or annexed, respectively, to the several parcels of land for the benefit of which they were created. The right of way to the Hanley farm has never been abandoned; it was assignable: *Chappel v. New York, New Haven, and Hartford R.W. Co.*, 62 Conn. 195, and the deed from Smithson's representatives to Hanley in terms conveys it to him. It had none of the incidents of a farm crossing under the statute. It was something essentially different in character taken by Smithson in lieu of the farm crossings to which he would have been entitled.

I therefore conclude that defendant Hanley is entitled to a right of way over the strip of land granted by Smithson to plaintiffs lying to the North of their right of way, and that such a right of way extends from the Johnson Settlement road to the gate erected by plaintiffs to give entrance to that part of Smithson's lands now comprised in Hanley's farm.

Action dismissed with costs; judgment for defendant on counterclaim with costs, declaring him entitled to the right of way above defined.

INTERCHANGE OF TRAFFIC.

CANADA.]

[BOARD OF RAILWAY COMMISSIONERS.
[SUPREME COURT.]GRAND TRUNK R.W. CO. V. CANADIAN PACIFIC R.W. CO. AND
CITY OF LONDON.

(Unreported.)

Interchange of traffic—Tolls—Branch line—Continuous line, secs. 44, 137, 214, 253, 266, 267, 271, Railway Act, 1903, Amendment 6 Edw. VII. ch. 42, secs. 15, 28—Appeal to Supreme Court.

The Grand Trunk Railway Company constructed a branch line connecting its line of railway with that of the Canadian Pacific Railway Company; both companies having terminal facilities in the City of London and no other connection at or near London, except this branch. The Grand Trunk Railway Company refused to interchange traffic by means of such branch line, claiming that in the division of rates for traffic interchanged by this branch by the two companies, a larger proportion should be assigned to them than would be a fair remuneration for the service to be rendered in transporting cars over this branch and its London terminal lines and loading and unloading them.

Held, that the Grand Trunk Railway Company was obliged to furnish for the carriage over its proportion of the continuous line (formed by this branch with the line of the Canadian Pacific Railway Company), and for the receipt and delivery of such traffic and for the loading and unloading of cars for the purpose, the same facilities as in respect of traffic passing over its own lines only or transferred to or by it at distant points of the Canadian Pacific Railway system, and that the apportionment of rates should be deemed to be made on this basis that the division between the railway companies of the joint rates for traffic thus interchanged should be made upon the principle of giving reasonable compensation for the services and facilities furnished by the respective companies in respect of the particular traffic thus interchanged and not by reference to the magnitude of the business of one company or the other at particular points or the respective advantages which each can offer to the other there, or a comparison of the loss which the one is likely to sustain with the gain likely to accrue to the other from the giving of the facilities which the law requires.

Upon appeal to the Supreme Court of Canada—

Held, 1. That the Board had authority under the Railway Act, 1903, and particularly under sections 253, 271, 266 and 267 to make the order in question under the circumstances in this case.

2. That sections 266 and 267 of the Railway Act, 1903, are applicable under the circumstances of this case where one and the same through rate is charged to and from all points within the district lying in and about the City of London to which the Order applies.

3. That the Order appealed from does not involve the obtaining by the Canadian Pacific Railway Company of the use of the tracks, station or

station grounds of the Grand Trunk Railway Company at London for which the Grand Trunk Railway Company should obtain compensation under the Railway Act, 1903, and particularly under section 137.

- 4, That the Board was not "bound as a matter of law" to take into consideration, in estimating the remuneration or compensation to be allowed to the Grand Trunk Railway Co. in consequence of or for what was required of that company by the said Order:—
- (a) The magnitude of the business of the Grand Trunk Railway Co. at London as compared with that of the Canadian Pacific Railway Co. at that point;
 - (b) The comparative advantages which each of the said two companies can offer to the other there;
 - (c) A comparison of the loss which one company is likely to sustain with the gain likely to accrue to the other company from the giving of these facilities which the law requires;
 - (d) The amount which may have been expended by the Grand Trunk Railway Co. in the acquisition of its terminal facilities at London or the value of its investments therein, otherwise than as evidence of the fair value of the service to be rendered and of the use of the facilities to be afforded under the said Order.

THE following statement of the facts is taken from the judgment of the Chief Commissioner:—

The Canadian Pacific Railway Company applied to the Board for an Order directing the Grand Trunk Railway Company to afford proper facilities for the interchange of traffic between the said companies over the branch authorized by order of the 6th of July, 1904, to be constructed by the Grand Trunk Railway Company from a point on its line between London and St. Mary's to the line of the Canadian Pacific Railway Company, between London and Toronto, and fixing the amounts to be charged for such interchange of traffic and the interswitching of cars over the said branch.

The lines of the two railways in the City of London before the construction of this branch were at a considerable distance apart. Their only present connection at or near London is by this branch, which is four thousand eight hundred feet long.

The railway lines now operated by the Grand Trunk Railway Company in and through the City of London were in existence long before the Canadian Pacific Railway was constructed.

The Grand Trunk Railway Company has extensive terminal properties at that point, including a large number of sidings to

various business and manufacturing premises, and a considerable number of team tracks upon which cars are loaded or unloaded. The company has an extensive business at that point.

The terminal facilities and business of the Canadian Pacific Railway Company at London are small as compared with those of the Grand Trunk Railway Company.

By means of the branch mentioned, the railway cars can be taken to and from a large number of business premises in London to which the Canadian Pacific Railway Company has heretofore not had direct access.

The advantages which the Canadian Pacific Railway Company can offer to the Grand Trunk Railway Company in this respect at and near London are very small as compared with those which this connection will afford to the Canadian Pacific Railway Company. On this account it was urged that, in the division of rates for traffic interchanged by this branch between the two companies, a very large proportion should be assigned to the Grand Trunk Railway Company—much greater than that which would be a fair remuneration for the mere service to be rendered by the Grand Trunk Railway Company in the transportation of cars over this branch and its London terminal lines and the loading and unloading of the same.

The City of London joined in the application, which was heard by the Board at Ottawa on the 20th June, 1905.

Angus MacMurchy and *J. E. McMullen* for the applicants.

T. G. Meredith, K.C., for the City of London.

M. K. Cowan, K.C., for the Grand Trunk Railway Company.

July 20th, 1905. THE CHIEF COMMISSIONER:—By section 253 of the Railway Act, 1903, "all companies shall, according to their respective powers, afford to all persons and companies all reasonable and proper facilities for the receiving, forwarding and delivering of traffic upon and from their several railways, for the interchange of traffic between their respective railways,

and for the return of rolling stock . . . ; and every company which has or works a railway forming part of a continuous line of railway with, or which intersects, any other railway, or which has any terminus, station or wharf near to any terminus, station or wharf of any other railway, shall afford all due and reasonable facilities for delivering to such other railway, or for receiving from and forwarding by its railway all the traffic arriving by such other railway without any unreasonable delay, and without any such preference or advantage, or prejudice or disadvantage, as aforesaid, and so that no obstruction is offered to the public desirous of using such railways as a continuous line of communication, and so that all reasonable accommodation, by means of the railways of the several companies, is, at all times, afforded to the public in that behalf; and any agreement made between any two or more companies contrary to this section shall be unlawful and null and void."

By section 271, "The facilities to be afforded as required by section 253 shall include the due and reasonable receiving, forwarding and delivering by the company, at the request of any other company, of through traffic, and in the case of goods shipped by car load of the car with the goods shipped therein, to and from the railway of such other company, at a through rate, and also the due and reasonable receiving, forwarding and delivering by the company, at the request of any person interested in through traffic, of such traffic at through rates."

Section 266 provides for the making of joint tariffs by agreement between companies whose railways provide a continuous route.

Section 267 enables the Board to require railway companies to agree upon and file a joint tariff satisfactory to the Board, or that the Board "may, by order, determine the route, fix the toll or tolls, and apportion the same among the companies interested, and may determine the date when the toll or tolls so fixed shall come into effect, and traffic shall be carried by the companies in accordance therewith:" and by sub-section 3 "in any case where there is a

dispute between companies interested as to the apportionment of a through rate in any joint tariff, the Board may apportion such rate between such companies."

With the progress of invention, new enterprises are continually supplanting or injuring old ones to the ruin or loss of those interested in the former. Railways have not only directly affected in this way former modes of transportation, but they have also been instrumental in building up particular localities or enterprises at the expense of others. It has never been the policy of the law to afford compensation for losses thus occasioned. When the legislature authorizes the construction of new lines of railway in competition with those formerly existing, this is not done with a view to benefit the promoters of the new lines or to injure those interested in the old ones, but solely for the public good.

The provisions of the Railway Act which require railway companies thus to interchange traffic at connecting points are introduced, not for the purpose of benefiting one railway company at the expense of another, but solely in the interest of the public. The law cannot recognize anything in the nature of a good-will of the business of either railway company thus affected for which another should give compensation. In my opinion the division between railway companies of the joint rates for traffic thus interchanged should be made upon the principle of giving reasonable compensation for the services and facilities furnished by the respective companies in respect of the particular traffic thus interchanged, and not by reference to the magnitude of the business of one company or the other at particular points or the respective advantages which each can offer to the other there, or a comparison of the loss which the one is likely to sustain with the gain likely to accrue to the other from the giving of the facilities which the law requires.

It has also been urged on behalf of the Grand Trunk Railway Company that the Board should deal with this question of the division of such rates or the allowance of charges for inter-

switching in a general way and by reference to all the points in Canada where the railways of these two companies connect.

It does not appear to me that this can properly be done. I think that in each case the nature and value of the service to be rendered and the facilities to be used must be taken into consideration. With this in view, the Board sent its Chief Traffic Officer to look over the situation in London and give to the Board an estimate of the amounts which should be apportioned to the Grand Trunk Railway Company for the services to be rendered by it in the interchange of traffic over this line and the facilities which will thus be placed at the disposal of shippers and consignees of freight in London.

After having examined the locality and considered the information acquired in this way, as well as that supplied by the answers of the respective companies to questions framed by the representatives of the Grand Trunk Railway Company, the Traffic Officer has made a report, upon which, in my opinion, the Board should act.

It is clear, I think, that the Grand Trunk Railway Company is obliged to furnish, for the carriage of traffic over its portion of the continuous line, for the receipt and delivery of the same and for the loading and unloading of cars for the purpose, the same facilities as in respect of traffic passing over its own lines only or transferred to or by it at distant points of the Canadian Pacific Railway system, and the apportionment of the rate should be deemed to be made upon this basis.

There should be an order requiring the Grand Trunk Railway Company to afford all reasonable and proper facilities for receiving, forwarding and delivering all traffic offered to it in cars wholly or partially loaded for passage over the branch in question and its lines connected therewith and of unloaded cars so offered and of freight offered to it for carriage to and over the lines of the Canadian Pacific Railway by the medium of the said branch, and for the interchange, by means of the said branch, of traffic between its lines and those of the Canadian Pacific Rail-

way Company, as well as between the lines of the Canadian Pacific Railway Company and those of other railway companies connecting with the lines of the Grand Trunk Railway Company.

The order should provide that the rates to be charged for such traffic shall be those provided for by any joint tariffs in existence between the railway companies interested, and, in the event of there being none, the rates charged by the Grand Trunk Railway Company between the same points, and, in the absence of either, the rates charged by the Canadian Pacific Railway Company between the same points; also, that in the division of rates for such traffic, the Grand Trunk Railway Company shall be entitled to charge and receive the following tolls for switching freight and live stock traffic, in carloads, from and to the Canadian Pacific Railway at or near London by means of the said branch, namely:

(a) Between the point of connection of the Grand Trunk Railway interchange track and the Canadian Pacific Railway siding, and all delivery tracks and sidings owned or controlled by, or connecting with, the lines of the Grand Trunk Railway between and including the Canadian Packing Company's plant on the east and the London Street Railway interchange, known as Springbank siding, on the west, except as provided in clause "b"; one cent per one hundred pounds, but not less than five dollars per carload, for each complete haul in either direction; no extra charge to be made for the movement of the empty car in the opposite direction.

(b) For the intermediate switching of through or joint freight and live stock traffic between the point of connection designated in clause "a" and the point of connection of the Grand Trunk Railway with the Pere Marquette Railway, three dollars per car, in either direction, regardless of the weight; no extra charge to be made for the transfer of the returning empty car.

The order should also provide that all devices such as free or assisted cartage or cartage allowances intended to equalize the facilities of the respective railways of the Canadian Pacific Rail-

way Company and the Grand Trunk Railway Company for the collection and delivery of freight at or near London, except the customary system of cartage published in the freight tariffs of the respective companies, be prohibited, and that all preference, prejudice and discrimination in such cartage system be prohibited.

The order should provide for its coming into force forthwith.

The provisions of the formal order issued by the Board are as follows:—

IT IS ORDERED—

1. That the Grand Trunk be, and it is hereby, ordered to afford all reasonable and proper facilities for the interchange, by means of the said branch, of freight and live stock traffic and the empty cars incidental thereto, between its lines and those of the applicant company, in both directions, as well as between the lines of the applicant company and those of other railway companies connecting with the lines of the Grand Trunk.

2. That the rates to be charged for such traffic shall be those provided for by any joint tariffs in existence between the railway companies interested, and, in the event of there being none, the rates charged by the Grand Trunk, between the same points, and, in the absence of either, the rates charged by the applicant company between the same points.

3. That in the division of the said rates the Grand Trunk shall be entitled to charge and receive the following tolls for switching freight and live stock traffic from and to the applicant company's railway at or near London by means of the said branch, together with the use for the purpose of such traffic of all such facilities as are, and from time to time shall be, used by the Grand Trunk in and about the City of London and other points of origin or delivery of the said traffic for the transfer, carriage, loading, unloading and delivery of similar traffic carried or offered for carriage over the lines of the railway of the Grand Trunk, namely:—

(a) All such traffic switched or transferred between the point of connection of the said branch with the applicant company's siding, and all tracks and sidings used for the purpose of loading and unloading cars, and owned or controlled by, or connecting with the lines of, the Grand Trunk between and including the Canadian Packing Company's plant on the east and the London Street Railway interchange, known as Springbank siding, on the West; excepting such sidings adjoining the Grand Trunk freight shed or sheds as may be necessary for the convenient transfer thereto and therefrom of freight ordinarily handled by the Grand Trunk employees, and except as provided in clause (b); one cent per hundred pounds, but not less than five dollars for each loaded or partially loaded car for each complete haul in either direction; no extra charge to be made for switching the empty car in the opposite direction.

(b) For the intermediate switching of through or joint freight and live stock traffic between the point of connection designated in clause (a) and the point of connection of the Grand Trunk with the Pere Marquette Railway, three dollars per car, in either direction, regardless of the weight; no extra charge to be made for switching the returning empty car.

4. That all other devices, such as free or assisted cartage, or cartage allowances, intended to equalize the facilities of the respective railways of the applicant company and the Grand Trunk, for the collection and delivery of freight at or near London, except the customary system of cartage published in the freight tariffs of the respective companies, be, and the same are, hereby prohibited.

5. That all preference, prejudice and discrimination in such cartage system be, and the same are hereby, prohibited.

6. That the provisions of this order shall forthwith come into effect.

The Grand Trunk Railway Company obtained leave to appeal to the Supreme Court under the provisions of section 44 of the Railway Act, 1903, and the following questions were submitted for the opinion of the Court:—

1. Had the Board authority, under the Railway Act, 1903, and particularly under sections 253, 271, and 214, to make the Order in question under the circumstances shewn in the record in this case?

2. Are sections 266 and 267 of the Railway Act, 1903, applicable under the circumstances of this case where one and the same through rate is charged to and from all points within the district lying in and about the City of London to which the said Order applies?

3. Does the Order appealed from involve the obtaining by the Canadian Pacific of the use of the tracks, station or station grounds of the Grand Trunk at London, for which the Grand Trunk should obtain compensation under the Railway Act, 1903, and particularly under section 137?

4. Was the Board "bound, as a matter of law," to take into consideration, in estimating the remuneration or compensation to be allowed to the Grand Trunk in consequence of or for what was required of that company by the said order:—

(a) The magnitude of the business of the Grand Trunk at London as compared with that of the Canadian Pacific at that point;

(b) The comparative advantage which each of the said two companies can offer to the other there;

(c) A comparison of the loss which one company is likely to sustain with the gain likely to accrue to the other company from the giving of these facilities which the law required;

(d) The amount which may have been expended by the Grand Trunk in the acquisition of their terminal facilities at London or the value of their investments therein, otherwise than as evidence of the fair value of the service to be rendered and of the use of the facilities to be afforded under the said Order;

(e) The amount of any further investment of capital which the Grand Trunk may be obliged to make in order to carry out the terms of the said Order, otherwise than as excepted by the last preceding paragraph.

December 5, 1906.

E. Lafleur, K.C., and *W. H. Biggar*, K.C., for the appellants.

The effect of the Order is far reaching; it makes the Grand Trunk a switching agent for the Canadian Pacific, its competitor, which thereby is given access to the yards and side tracks of the Grand Trunk in London; it compels the Grand Trunk to appropriate the use of its switch engines and the service of its train crews for the use and benefit of the Canadian Pacific. The public interest does not require the sections of the Act, sections 253, 266, 267 and 271, to be so construed. They must be construed strictly when it is sought to deprive the Grand Trunk of its property: *Simpson v. South Staffordshire Waterworks Co.*, 4 DeG. V. & S. 685; *DeCamp v. Hibernia R.W. Co.*, 49 N.J.L. 50. Section 253 does not provide for the case of switching cars at a common point such as London, where such company has its own terminal facilities. It was intended to provide for a case where the shipper may forward goods over two railways forming a continuous line to a destination which he cannot reach by either railway. The first question should be answered in the negative.

As to the second question—the Order could not be based upon any division of through rates under sections 266 and 267, because no joint tariff can be made to apply to a switching company as agent of the hauling carrier, the switching company does not receive part of the through rate; it receives a fixed sum which is absorbed in the through rate.

As to the third and fourth questions—the Order amounts to a condemnation of the Grand Trunk terminals at London for the use of the Canadian Pacific. If the Order can be supported at all, it must be under section 137 and not under section 253 of the Railway Act. If it holds good, any little railway company may, without any expenditure of capital for building terminals, enjoy the facilities of a large system in a metropolis on payment of a small switching charge, and, freed from the burden of an enormous outlay, compete unfairly with the larger system in

the latter's own yards and private sidings—this is a use by one company of the system of another which amounts to a *partial expropriation*, for which, if ordered, compensation should be made. If no partial expropriation is involved in the order appealed from, the opinion of the Chief Commissioner in excluding from consideration the matters mentioned in the fourth question may be quite correct, but if not, these considerations all appear to be relevant and important.

T. G. Meredith, K.C., for the City of London, referred to the recent amendments to the Railway Act, 1903, 6 Edw. VII. ch. 42, sec. 15, sub-section 5 of section 177 and section 28, confirming the authority of the Board to make the order. The appellants cannot now refuse to carry out the terms of the Order for interchange of traffic. Bigelow on Estoppel, 3rd ed., 58 and 601. Full effect must be given to the Statute even though its provisions seem to bear heavily upon the appellants. *Attorney-General v. Carlton Bank* (1899), 2 Q.B. 164; *Hoddinatt v. Newton* (1901), A.C. 57. The decision of the Board as to what constitutes a continuous route within the meaning of the Railway Act is a question of fact to be determined by the Board and its decision is final by section 42 (31) Railway Act, 1903. The power of the Board to order interchange of freight is not conferred merely for the convenience of the railways, but is conferred mainly for the convenience of the public and with a view of affording to the public traffic facilities without the unnecessary multiplication of lines.

Angus MacMurphy for the respondent railway company.

Under the particular circumstances of this case the first two questions should be answered in the affirmative.

The branch line was constructed by the appellants upon the express representation and distinct understanding and agreement that it should be used for the interchange of traffic between the lines of the two companies—a physical connection between the

branch line and the respondents' line has been made and approved by the Board and an order has been obtained authorizing the opening of the branch line for the carriage of traffic.

The appellants ratified and adopted without objection the Order of the Board requiring any agreements for the interchange of traffic between the two lines to be submitted to the Board for its approval, but have failed to agree upon a division of rates.

The authority of the Board under section 267 in the case in dispute, where the companies fail to agree upon the tariff of rates applicable to such traffic to be interchanged, is under the special circumstances of the case complete.

It is too late for the appellants to recede from their agreement and attempt to limit the interchange of traffic to that between non-competitive points. By section 214 the appellants are obliged to interchange all kinds of traffic at the junction of the branch with the respondents' line.

The general proposition decided by the Supreme Court of the United States in *Central Stock Yards v. Louisville & Nashville R.W. Co.* (1903), 192 U.S.R. 568, may be conceded that a statutory requirement to deliver freight to any point where there is a physical connection between the tracks of two railways must be taken to refer to cases where the freight is destined to some further point of transportation over a connecting line; the Court points out that a case may be imagined where carriage to another station in the same city by another railway might fairly be regarded as a *bonâ fide* "further transportation" over a connecting railway.

The district to be served extends for a number of miles in either direction beyond London and it may well be that this case falls within the exception.

Similar orders have been made under the corresponding provisions of the English Railway and Canal Traffic Acts. In *Caledonian R.W. Co. v. North British Railway Co.* (No. 4), 3 Ry. & C. Tr. Cas. 403, the public interest is involved; it is not merely a dispute between two railway companies where the interchange

shall be made—*ibid* pp. 407 and 408. See, also, *Didcot v. G.W.R. Co. & L. & N.W.R. Co.*, 9 Ry. & Co. Tr. Cas. 210; *Belfast Central R.W. Co. v. Gt. Northern R.W. Co.*, 4 Ry. & C. Tr. Cas. 159. Under section 2 Ry. & Canal. Tr. Act (1854), corresponding to section 253 of the Railway Act, 1903, such facilities have been ordered at the instance of shippers who have been entitled to have their traffic conveyed by any practicable route they please and to use the two connecting railways as one continuous line: *Victoria Coal & Iron Co. v. Neath & Brecon and Midland R.W. Cos.*, 3 Ry. & C. Tr. Cas. 37, and it is no answer to the public desirous of using the railways as a continuous line that there are disputes as to the rights of the companies *inter se*: *Hamman v. G.W.R. Co.*, 4 Ry. & C. Tr. Cas. 181.

In answer to the third question—section 137 does not apply to this case—the engines of the appellants do all the switching service necessary on the branch and other lines of the appellants and private sidings; the engines of the respondents cannot come upon any of these lines or sidings and running powers are not exercised over them. If the third question is answered in the negative, then the matters referred to in the fourth question have been taken into consideration by the Board as stated in the judgment, as far as the nature and value of the service to be rendered and the facilities to be used are concerned and the finding of the Board upon the question of fact will not be interfered with by the Court: section 42 (31) Railway Act, 1903.

E. Lafleur, K.C., in reply.

11th December, 1906. The judgment of the Court was delivered by

DAVIES, J.:—Since this appeal was taken from the decision of the Railway Commissioners, Parliament has enacted an amendment to the Railway Act, placing beyond doubt the power of the Commissioners to make such an order as the one now appealed from.

Our decision, therefore, as to what was the true meaning of the original Act is of no public importance and we do not see any good purpose in stating reasons for the conclusion we have reached that the appeal must fail.

We should answer the first and second questions in the affirmative and all others in the negative.

GIROUARD, MACLENNAN and DUFF, JJ., concurred.

IDINGTON, J.:—The Board of Railway Commissioners for Canada have pursuant to section 44 of the Railway Act, 1903, allowed an appeal to be taken to this Court from an order of the Board of the 20th July, 1905.

The order is as to the direction to the appellants, to afford all reasonable and proper facilities, almost in the very words of the first five lines of section 253 of the Railway Act, 1903, if we read the word "traffic" therein as interpreted by the interpretation clause of the Act in question. It amplifies the word "traffic" in the same sense as I read this interpretation. It uses the words "freight and live stock" instead of the word "goods" and the words "empty cars" instead of the words "rolling stock."

I accept these substitutions as, if not, synonymous, at least equivalent expressions.

The order is clearly within the meaning of the section which has imposed the obligation and, therefore, as a command to discharge the duty that obligation imposed, within the power of the Board to make—unless the branch line over which it is to become operative can be excluded from the subject matter of that jurisdiction as something not within the purview of the Act—or and especially of this section.

Having given every consideration to the arguments that it is said should lead to this exclusion I am unable to give effect to them.

That the roads have each terminals at or in the same city can make no difference. It might well happen that a manufacturer,

for example, an iron founder, had at the Grand Trunk terminal a foundry and siding and had discovered beside the Canadian Pacific terminal a coal mine or other mine that furnished him some such needful article as he desired to transport to his factory or foundry. Though only two miles away I see no reason why he should be deprived of the facilities for transportation thus afforded.

The illustration can be multiplied by others equally opposite. Distance of carriage, I think, cannot be taken into consideration as an element that would tend to exclude, from the beneficent provision of this Act, any one who has goods to be carried. And once you take the element of distance out of the case or argument, I see nothing to exclude this branch from being subject as any other connecting the two lines of road from the jurisdiction of the Board.

Moreover, when we find that this very branch was constructed by virtue of authority given by this Act and for the express purpose of an interchange of traffic, how can it be said that it does not come fully within it?

The question of rates, and the subdivisions of the same question, presented to us, seem to be settled by finding the power to make the part of the order I have referred to, as falling within section 253; and as a result thereof also sections 271, 266 and 267.

Unless the Board acted or professed to act or was by implication to be supposed driven to rely upon section 137, the many grave questions raised by appellants' counsel cannot legally have been within the consideration of the Board in determining the rates.

I recognize to the fullest extent the meaning of the grievances that the appellants' counsel has so forcibly put before us as the probable effect of the order in this instance.

I see nothing in the Act, however, to enable the Board to ameliorate these results. The purpose of the Act is that the public must be served. The whole scope of the Act is to give effect to that purpose.

Both contending railway companies are but the creation for a like purpose. Beneficent as each has been in a wide sense, some hamlets and towns have decayed as the result of the creation of either.

The suffering in this case or any other of the like kind, is but an incident like the growing pains of the boy.

The appeal must be dismissed with costs. And I think the questions submitted must be answered as follows: the first and second questions, in the affirmative and all the others in the negative.

Appeal dismissed with costs.

W. H. Biggar, K.C., solicitor for appellants.

T. G. Meredith, K.C., solicitor for respondent, the City of London.

Angus MacMurchy, solicitor for the respondents, the Canadian Pacific Railway Company.

HIGHWAYS ACROSS RAILWAY—POWERS OF BOARD.

CANADA.]

[BOARD OF RAILWAY COMMISSIONERS.

HIGH RIVER ET AL. v. CANADIAN PACIFIC RY. CO.

Highways across railway—Right of private individuals and public bodies to make—Powers of Board as to specific performance—Secs. 23, 36, 47, 184 to 191, Railway Act, 1903.

Upon applications by certain towns and villages in Alberta in respect of street crossings over the Canadian Pacific Railway:—

Held, that while the Board has no general jurisdiction to determine whether a public right of crossing over a railway exists, yet in cases where it is called upon to exercise the powers specifically conferred upon it, or its jurisdiction to enforce the performance of the duties of railway companies with respect to highways, it has incidentally to inquire and determine whether in fact a right of crossing does or does not exist at any particular point, secs. 186 and 187 Railway Act, 1903.

Section 187 enables the Board to give leave for the construction of a highway across a railway, but does not provide means by which private individuals or bodies not otherwise possessed of power to open highways, can do so.

The Board is not authorized to direct or compel railway companies to construct or make highways across their lands, where a public right of crossing does not already exist by law, although it may give leave to a company or some other body to do so.

The question as to the power of a railway company to dedicate a portion of its right of way for use as a public highway without the authority of the Railway Committee or the Board under the Railway Acts reserved for further argument.

The following statement of facts with regard to these applications is taken from the judgment of the Chief Commissioner:

During the official trip of the Board in Western Canada in the summer of 1906, a number of applications were brought before it in respect of street crossings over railways in the Province of Alberta. One of these related to a large number of crossings in the City of Calgary over the line of the Canadian Pacific Railway Company. This was settled by agreement between the city and the railway company and an order, in conformity with the agreement, was issued later.

Another was an application by the Town of High River for

an order directing the Canadian Pacific Railway Company to provide and construct a suitable highway crossing where its railway intersected Fourth Street in that town. The application alleged that there was no railway crossing between the Calgary & Macleod Trail and Seventh Street according to a plan which shewed Fourth Street as lying in the intermediate space, and that the opening of Fourth Street was necessary for the proper enjoyment of the use of the streets of the town and for the safety of the inhabitants.

A third was the application of the Town of Olds for leave to construct certain highways across the railway of the Canadian Pacific Railway Company's Calgary & Edmonton Branch, at Olds, to join and connect certain named streets lying on each side of the railway.

While this application alleged the previous existence of certain crossings upon the lines of certain named streets, known as Second and Third Streets, it further alleged that the only legal crossing which the town had at the time of the application was at the extreme north end of the town, which was north of either of the streets named.

A fourth was that of the Town of Didsbury for an order, "under the provisions of the Railway Act, 1903, respecting highway crossings, being sections 184 to 191, inclusive, and particularly under section 187, directing the Canadian Pacific Railway Company to construct and provide a suitable crossing and to maintain the same perpetually where the continuation of Hespeler Street, in the said Town of Didsbury, if continued easterly without the obstruction being placed thereon by the Canadian Pacific Railway Company, would cross the said railway company's right of way."

The application alleged that Hespeler Street in Didsbury, "for some years past, and until it was obstructed by the said the Canadian Pacific Railway Company on or about the 1st day of August, 1906, was a highway and was used as such by the public." It further alleged an express agreement between

the railway company and the town for making Hespeler Street a perpetual highway across the railway, and that the town had, at the request of the railway company, improved Hespeler Street upon the company's right of way, and had expended a considerable sum of money in doing so; that the railway company had placed a large quantity of earth upon Hespeler Street where it crossed the company's right of way, and that the town had used and employed this earth in further grading and improving the street at the request of the railway company; and that the railway company had indicated by a sign that there was a highway crossing over the railway at that point; and setting forth other circumstances as shewing the importance, in the public interest, of having a highway crossing at Hespeler Street.

The application further alleged that the railway company had recently obstructed the crossing at Hespeler Street and deprived the public of the use and enjoyment thereof.

A fifth application was made by the Village of Leduc for a street crossing over the Calgary & Edmonton Branch of the Canadian Pacific Railway Company at Mill Street. In answer to this application, the Canadian Pacific Railway Company submitted a plan of the town site and existing crossings at Leduc, pointing out that "from the plan it will be seen that there is already a crossing at the point known as the 'Edmonton Trail,' another nearly opposite Main Street, and a third about 1,600 feet south of the latter."

Upon examination of the locality by an engineer of the Board, he reported that he had inspected the site of the proposed crossing in company with the overseer and principal business men of the village, and that "the overseer and the others agreed that, if the village has to build and maintain the crossing, it would be just as well for them to build a road along the east side of the railway from Mill Street north to Main Street and cross there where there is already a crossing."

Subsequently, the village presented to the Board a formal

petition with reference to the crossing at Main Street, setting out that what was and is sought was the making permanent of a crossing at Main Street, "which crossing is and always has been the most commonly used access to the railway station."

In the case of High River, negotiations took place between the town and the railway company which did not result in a complete agreement, but served only to indicate the respective positions of the parties. The town desired, in addition to the crossing at Fourth Street, to have the passenger station of the company removed to the neighbourhood of that crossing, and offered, in consideration of these advantages, to pay a certain sum towards the expense of such removal, and to procure for the railway company a piece of land for the prolongation of its yard at the town in a southerly direction. The company claimed to be bound by an agreement with a private party which prohibited it from removing the station to the desired position, and objected to the establishment of a street crossing at Fourth Street, but offered to allow a crossing to be established at Third Street and to remove the station to the neighbourhood of that crossing, provided the town would procure for the company the proposed lands and would close the admittedly existing highway crossing over the railway at Seventh Street. The town refused to accept the condition for the closing of the crossing at Seventh Street.

In the case of the Town of Olds, the railway company offered a crossing at Second Street, with an extension of Railway Street (which runs paralld with the railway) to Seventh Street, and another crossing on Seventh Street. The town was willing to limit its request to a crossing at Third Street and one at Seventh Street, with the extension mentioned.

Didsbury is not a town but a village municipality, established under the Ordinances of the North-West Territories. Counsel for the village claimed that a public highway had been established at Didsbury by dedication of the railway company, after the construction of the railway. It was not suggested that any public highway had existed at that point before the

railway was constructed. The contention, on behalf of the railway company, was that it was incompetent for the company to establish a highway by dedication without leave of the Railway Committee of the Privy Council under the legislation preceding the Railway Act, 1903, or of the Board since its establishment. Counsel for the village argued that the railway company could so dedicate without leave.

In the case of the Leduc application, which is also a village established under the Ordinances of the North-West Territories, counsel for the railway company submitted an offer to allow a crossing to be authorized at Main Street, as well as another at Douglas Street, in the village, upon the condition that it should be ordered that, in case of any protective measures or appliances being required at the crossing in the future, the cost thereof should be borne by the village. It was claimed, on behalf of the village, that it had for a long time a crossing at Main Street, and that the village ought not to be now bound to bear such expense.

6 November, 1906. **THE CHIEF COMMISSIONER:**—In connection with these cases it appears to be desirable to consider the functions of the Board with respect to railway and highway crossings. Section 184 authorizes the Board to grant leave to a railway company to carry its tracks upon, along, or across an existing highway. Section 186 lays down a method of procedure "upon any application for leave to construct the railway upon, along, or across an existing highway, or to construct a highway across an existing railway." and authorizes the Board to grant such application upon such terms and conditions as to protection, safety, and convenience of the public as it may deem expedient, or to order that the highway be carried over or under the railway, and works to be executed or measures taken to remove or diminish the danger or obstruction arising or likely to arise therefrom; and section 187 confers upon the Board the power, in the case of a railway already existing upon,

along, or across a highway, to make any order in respect thereto as in the previous section provided.

Other provisions of the Act impose upon the railway company specific duties with reference to highways, or assign to the Board certain specified powers with respect thereto; and the Board, under the general jurisdiction given by section 23, is empowered to compel railway companies to observe the duties cast upon them by such provisions of the Railway Act.

As I have previously had occasion to point out, the Board is a creature of the statute, and has only the powers given to it by statute. While constituted a court for the purpose of exercising the jurisdiction conferred upon it, the Board is not a court for the determination of all questions arising between the public or individuals and a railway company. The Board has no general jurisdiction to determine whether a public right of crossing over a railway exists; but, in cases in which it is called upon to exercise the powers specifically conferred upon it with respect to highways, or its jurisdiction to enforce performance of the duties of railway companies with respect to highways, it has incidentally to inquire and determine whether, in fact, a right of crossing does or does not exist at a particular point.

For two or three years the public were in the habit of crossing the railway upon the line of Hespeler Street in Didsbury, and this was facilitated by grading a street line upon the company's right of way outside the rails and by planking at and between the rails. This work has been undone and the crossing so obstructed that the public cannot now cross. It appears to me, that, if there is a public right of crossing at that point, the Board has jurisdiction, under sections 186 and 187 of the Act, to direct that such measures be taken as to enable the public to cross there safely and conveniently, and that, for the purpose, the Board has jurisdiction to determine whether the right of public crossing exists.

The Railway Act, 1903, nowhere prohibits in express terms the construction of a highway, or the giving of a public right

of crossing, over a railway, without the leave of the Board; but it appears to assume that, for some purposes, such leave is necessary. I take it to be assumed that, without some provision therefor, a municipality or other body having power under the local law to open a highway across private property without the consent of the owner, could not open such across property dedicated by authority of the Parliament of Canada to the purposes of a railway; and it appears to me that the provisions of section 186 are intended, in part, to afford the means of enabling such municipality or body to do this where the public interest requires it. But, in my opinion, this clause enabling the Board to give leave for the construction of a highway across a railway, was not intended to provide a means by which private individuals, or bodies not otherwise possessed of power to open highways, could do so.

In this connection the question naturally arises whether the steps to open such a highway must be taken by the municipality or other body in accordance with the law generally applicable to the opening of highways, and whether compensation has to be given and determined according to such law.

I have never hitherto been called upon definitely to determine that question, which is by no means a simple one. Hitherto, without careful consideration, I have expressed an inclination to the view that the local law is applicable. On further consideration, however, I doubt this; but, in view of the fact that the point is, so far as I know, wholly unsettled by authority, and of my having previously used expressions which may have induced parties to consider the question to be settled so far as this Board is concerned, I would be ready to receive any argument upon the point which any one might desire to offer. It is very probable that Parliament intended the whole matter to be settled by this Board, and all the conditions in respect of compensation, as well as of procedure, construction, and precautions, to be determined by the Board. Section 36 gives to the Board general power to impose terms in making an order, and the provisions of section 47 appear

capable of application to such a case without undue straining of language. The Board has already decided that it is not bound to grant compensation to one railway company for the crossing of its line by the railway of another company; and the same principle might well be applied in cases of highway crossings.

But it should be observed that the power of the Board in this respect is to *give leave*. The Board is not authorized to direct or compel railway companies to construct or make highways across their lands where a public right of crossing does not already exist by law, though it may give leave to a company or to some other bodies, on some terms, to do so.

In the Didsbury case, counsel for the railway company cited the remarks of Hon. Mr. Blair, when Chief Commissioner, in an application made by the City of Calgary in 1904, reported in volume 10 of the reports of proceedings of the Board at page 4527, as follows:—

“Hon. Mr. Blair: Your legal position I cannot think would be very much improved or strengthened by reason of what has transpired; without an order of the Railway Committee of the Privy Council, or without an order of this Board, you have no legal right whatever to cross those tracks, notwithstanding, or no matter what may have been the understanding between you, or the agreement between you, or the user which has taken place, and no matter what dedication may have been made. The matter of dedication of a highway there would be a totally distinct and separate thing from the legalizing of the use of the right of way, or that portion which is occupied by the tracks of the railway company, for the purposes of a public highway. You have got to have that authority or else you have no legal ground upon which to stand.”

Upon a previous citation in another case of these remarks, I expressed myself as being inclined to the same view. Counsel for the village, however, argued strongly for the power of the railway company to dedicate a portion of its right of way for

use as a public highway without the leave of the Railway Committee or of this Board. Upon a reference to Canadian authorities I do not find that the contention of the railway company is as well supported as I was inclined to think at the time of the hearing. *Guthrie v. Canadian Pacific Ry. Co.*, 27 A.R. 64, 31 S.C.R. 155, 1 Can. Ry. Cas. 19, and *Grand Trunk Ry. Co. v. Vallier*, 2 Can. Ry. Cas. 245, 3 Can. Ry. Cas. 399, 7 O.L.R. 364, related to private rights; and *Grand Trunk Ry. Co. v. Vallier* was so distinguished in the Court of Appeal.

The expressions used by Hon. Mr. Blair and myself may have led counsel for the railway company to omit careful examination or argument of the question; and counsel for the village did not discuss the Canadian cases or the terms of the Railway Acts. It appears to me desirable, therefore, that, before the Board makes a definite decision upon this important question, an opportunity should be given to the parties to present such further arguments in writing as they may desire; and, in this connection, it would be desirable that further consideration be given by counsel to some other questions, such as the sufficiency of the evidence to warrant an inference of an intention on the part of the railway company to dedicate, and the power of the Canadian Pacific Railway Company to do so in respect of the line of the Calgary and Edmonton Railway Company: and the Board should be furnished with evidence of the relations of these two companies respecting the line. I understand that the line is under lease to the Canadian Pacific Railway Company, which may have no power to dedicate any portion of the land of the Calgary & Edmonton Railway Company as a public highway, even if it could so dedicate a portion of its own land: and circumstances which would warrant the inference of a dedication by the company whose officials are operating the railway, might be quite insufficient to warrant such an inference as against the lessor.

Towns and villages along the line of the Calgary & Edmonton railway owe their existence to that railway. Necessarily they must submit to many inconveniences inseparable from such

a situation. Where the Board exercises a discretionary power to determine at what points on such a railway street crossings shall be opened, it is obliged to consider the relative convenience of the public and the railway company, as well as the public safety. The efficient operation of the railway is a matter of importance both to the public generally and to the residents of the particular locality dependent upon it. It is particularly incumbent upon the Board to protect the public from the dangers attending such crossings; and in the performance of this duty, it must be on its guard against being too readily influenced by the insistence of those desiring relief from present inconvenience and led by self-interest to minimize the danger.

An examination into the position at High River indicates the importance to the community of a street crossing near the business centre of the town. It is admitted that the town was laid out by the original promoters of the railway, who, therefore, are, in some measure, responsible for the situation which has developed; and the company at present operating the railway must, for an application of the kind in question, be treated as affected by this responsibility. On this ground, it appears to me that there should be a crossing at Third Street upon the terms agreed to by the town, which appear to afford reasonable compensation to the railway company. Under the circumstances of the town and the probability of its growth westward, the closing of Seventh Street should not be insisted upon.

As regards Olds, the situation appears to be much the same. The convenience of the community, it appears to me, demands the crossing at Third Street; but, for the present, I do not think that more should be allowed, or that the southern crossing offered by the railway company as a condition of being relieved of the crossing at Third Street should be authorized.

At Didsbury, the promoters of the railway laid out the town site on one side of the railway only, retaining, in one block, land lying along the other side of the line. They held out no inducement to the growth of a town or village to the east of the

railway. Such growth as has arisen there, is upon land thus separated from the railway and the town on the western side. The village is much smaller than High River, and the importance of a crossing at a particular point is not so great. The public have not long been accustomed to regard the crossing at Hespeler Street as an open one. If there were no question of the existence of a public highway at Hespeler Street, but the case was submitted merely to the discretion of the Board, I would not be in favour of authorizing the crossing at that street. If the railway company will so place the warehouses on the east side of the track as to be convenient to the crossing at Waterloo Street, that crossing should, in my opinion, sufficiently answer the needs of the village.

It does not appear that the village has full power to open highways. Apparently this power was not given by the ordinances under which it was constituted. We have been referred to a late statute of the Province of Alberta, the terms of which I have not yet had an opportunity of learning. Unless the village had such power, I do not think that this Board can authorize the village to open a highway over the tracks of the railway company against the will of the company, although the Board might empower the company to open such a highway if it was willing to do so.

As to Leduc, I think that the company ought to open Main Street at least, unconditionally, leaving the question of protection for future consideration when the necessity arises. The company expressly indicated the crossing at Main Street as open in answer to the application for the making of a crossing at Mill Street. If the company is unwilling to do this, the matter is open to the same difficulty as in the case of Didsbury, though, upon its appearing that the locality has become incorporated as a town, an order might be made. If, upon further consideration of the Didsbury application, it should appear to the Board that, without leave, the company could dedicate a strip across its land as a public highway, and the company is unwilling to allow the crossing at Main Street as suggested, the

village should have an opportunity of shewing the existence of a public highway across the railway at that point.

Orders issued accordingly in the cases of the applications of the Town of High River and the Town of Olds.

NOTE.—The parties were asked to submit further arguments in writing in respect of the question of the power of a railway company to dedicate a portion of its right of way for use as a public highway without authority of the Railway Committee of the Privy Council, under the Railway Acts, previous to the establishment of the Board, or of the Board since its organization, and the question was subsequently argued by counsel before the Board at Calgary, Alta.

HIGHWAYS ACROSS RAILWAYS.

See the previous cases of *Grand Trunk Ry. Co. v. City of Toronto*, 1 Can. Ry. Cas. 82, and *Re Reid and Canada Atlantic*, 4 Can. Ry. Cas. 272.

TRESPASS—DAMAGES—TRIAL LINE.

MANITOBA.]

[RICHARDS, J., MATHERS, J.]

BARRETT v. CANADIAN PACIFIC RAILWAY CO.

(16 Man. L.R. 549.)

Railway Act, 1888, secs. 90, 92, 146—Action for damages in running trial line—When remedy limited to arbitration—Damages resulting from exercise of statutory powers.

If damages are occasioned to a landowner by the exercise of the powers conferred on a railway company by the Railway Act and there is no negligence in the mode of exercising such powers, the person injuriously affected is limited to the provisions of the Act for compensation. *C.P.R. v. Roy* (1902), A.C. 220, and *Bennett v. G.T.R.* (1901), 2 O.L.R. 425. But if there is negligence in such exercise of statutory powers, or if damages are unnecessarily inflicted, then an action will lie and the complainant is not limited to the remedy given by the arbitration clauses of the Act. The plaintiff's claim was for damages for cutting down trees in his grove through which the defendants were making a survey for a trial line for a proposed branch of their railway, but the possibility of running the trial line through the grove around it was not raised at the trial and the trial Judge did not pass upon it.

Held, that the plaintiff, who had been non-suited at the trial was entitled to a new trial to determine whether the line could not have been run in the manner suggested.

COUNTY COURT APPEAL.—In running a trial line for proposed branch of defendants' railway, their surveyor entered on the plaintiff's land and came to a grove without cutting down the trees by making a rectangular detour of trees near his dwelling house. They cut down a number of these trees on the course of the trial line, and the plaintiff sued for damages. The trial Judge assessed the damage, but thought that no unnecessary injury had been done. He therefore nonsuited the plaintiff, who appealed to the full Court.

1905. Dec. 11th. *J. E. O'Connor* for plaintiff, appellant. The evidence was not sufficient to shew that the cutting was absolutely necessary. The damage happened before the Railway Act of 1903 was passed. There was no evidence to shew that the plan had first been filed. By section 90 of the Railway Act of

1888, the company may, subject to the provisions of the Act, enter into and upon any land of Her Majesty without previous license therefor, or into and upon the lands of any person whomsoever, lying in the intended route or line of the railway and make surveys, examinations, or other necessary arrangements on such lands for fixing the site of the railway and set out and ascertain such parts of the lands as are necessary and proper for the railway. The license is only dispensed with where the lands are Crown lands. The "or" following the words "license therefor" is disjunctive and the company cannot enter on the lands of an individual owner until they have first applied for and received a license so to do. A railway company has no power to trespass except as authorized by the Railway Act. The power is to go on and survey, there is no right to cut trees except under sub-section (e) of section 90. *Expressio unius exclusio est alterius*. That shews no power to cut for mere purposes of surveying. Sub-section (a) does not give power to cut trees. The power to survey does not imply the power to cut trees, even if necessary for surveying. The Court, in order to read into a power to survey a power to cut trees, must hold that it is physically impossible to survey without cutting trees. There is no evidence to shew that it was physically impossible in this case and it lies on the company to shew that. They have not done so. The witness, Wilkin, does not shew that it was physically impossible but only says the work could not have been properly done otherwise, therefore the defendants have not met the onus that is on them to shew that: *Bannatyne v. Suburban Rapid Transit Co.*, 15 Man. L.R. 22. In that same section Parliament had the cutting of trees in mind, but confined it to one sub-section, (e), therefore rights as to cutting must be held to have been kept back in other matters in that section. Even if there were such a power in section 90, section 92 provides that the company shall in the exercise of the powers by this, or the Special Act, granted do as little damage as possible and shall make full compensation in the manner herein and in the Special Act provided to all parties interested for all damages by them sustained by reason of the

exercise of such powers. Even if the company had power under section 90, before any damage is done, compensation must be made as provided by the Act. If not, then the company is unquestionably liable. If the former the company must file plans, because the Act says the power of section 90 can only be exercised after filing plan and after making compensation. If the company cannot do that then they have no power. The power is by inference limited to cases where a plan can be filed. If no plan filed then the preliminaries are not complied with and the railway company were trespassers. See sections 123, 144, 146, 162. *Ontario & Quebec R.W. Co. v. Taylor*, 6 O.R. 338; *Saunby v. Water Commissioners*, 22 T.L.R. 37; *Smith v. Public Parks Board*, 15 M.R. 249; *Mason v. South Norfolk*, 19 O.R. 132; *Parkdale v. West*, 12 A.C. 602. It was not shewn that the trial line itself was necessary.

A. S. Bond for the defendants, respondents. If there is a power to survey given by the Act there is no compensation given: *Brand v. Hammersmith*, L.R. 4 H.L. 171. The cutting of the trees was incidental and necessary to the survey. It must be assumed that there was need to go through the bush. If the survey were lawful and necessary then the trial line was necessary, and if that were necessary and allowable the damage they necessarily did was allowable: *New Brunswick R.W. v. Robinson*, 11 S.C.R. 695; *Jackson v. G.T.R.*, 32 S.C.R. 252. By section 99 of the Railway Act the company cannot take Crown lands without the leave of the Crown, but section 103 of the Railway Act says that lands of private owners may be taken compulsorily. Provisions as to conditions precedent are not applicable to surveys but are applicable to taking: *Jones v. Stanstead*, L.R. 4 P.C. 120. Or at any rate the provisions of the Act as to compensating are only to be applied when applicable and possible and here they were neither one nor the other. Section 152 as to arbitration will apply in this case: *Parkdale v. West*, 12 A.C. 602. If plaintiff has any right to compensation it is under section 92: *St. Andrews v. G.W.R.*, 12 M.C.C.P. 399; *Ross v. C.P.R.*, 1 Can.

Ry. Cas. 478; *Reg. v. Cambrian*, L.R. 6 Q.B. 422. Plaintiff can by mandamus, compel defendants to proceed to arbitration: *Reg. v. G.W.R.*, 14 U.C.C.P. 462; *Powell v. Toronto*, 25 A.R. 209; *Jones v. Stanstead*, L.R. 4 P.C. 120.

O'Connor in reply. *Reg. v. Cambrian* was overruled in *Hopkins v. G.N.R.*, 2 Q.B.D. 224. In *Parkdale v. West* the case of *Jones v. Stanstead* was distinguished so as to shew it to be inapplicable here, and that it was a case of injury resulting from operation and not from construction. There was no evidence here that it was impossible to set out in advance the intended injury or to take compensation proceedings in advance. The cases cited by defendants' counsel are cases where operation and not construction was complained of. Operation is essential and therefore in operation cases the onus is on the plaintiffs to shew negligence. In construction cases the rule is different, and there the onus is on the party doing the damage to shew that it was unavoidable and that all conditions precedent to the right to do damage had been complied with: *Parkdale v. West*, 12 A.C. 602; *North Shore v. Pion*, 14 A.C. 612.

1906. February 10th. RICHARDS, J.:—I take the findings of law and fact by the learned Judge to be:—

(a) That defendants were justified in entering upon plaintiff's property to run the line.

(b) That in so entering and running the line they were protected by the Railway Act from an action at law for damage necessarily done, and that the plaintiff's remedy, if any, was only under the compensation clauses of the Railway Act.

(c) That, in order to run the trial line, the defendants were compelled to cut through the grove.

(d) That, on the assumption that they were so compelled, they did no unnecessary injury.

I agree with the learned Judge, that defendants were justified in entering on the property to run the line, and that an action at law would not lie against them for damages necessarily caused

by their running it. I also accept his finding of fact that, if it was necessary to cut through the grove the defendants did no unnecessary damage. The surveyor in charge of the party swore that "the work could not have been properly done without the cutting." It seems to me that he only meant, by those words, that the line could not have been properly run through the grove without the cutting.

But I am not satisfied that the line could not have been run without going through the grove, though it might be the most convenient way to cut through it. It seems to be that the following course of action would have avoided the trouble:—

When the line reached, or approached, the nearest point of the grove, another line, at right angles to the trial line, could have been run to one side, for a sufficient distance to clear the grove. Then, parallel to the trial line, and in the direction in which the latter was being surveyed, a further line could have been run, far enough to clear the grove in that direction. Then a line, run back at right angles, to this last-named one, in the opposite direction from, and parallel with, and of the same length as, the first departing line, would have given the exact location of the trial line on the further side of the grove and without the need of cutting through the grove.

The possibility of running the line as above suggested was apparently not raised at the trial. It seems to have been assumed that, in order to continue the trial line, it had, necessarily, to be run through the grove.

I am of opinion that, if the survey party could, as suggested above, have gone (as I think they could) around the grove, without losing their trial line, their cutting through the trees was the doing of unnecessary damage in respect of which the defendants are not protected by the Railway Act from an action. The mere fact that it was more convenient or expeditious to run through the grove was no justification in itself for the cutting.

I think the plaintiff should have one calendar month from this date to decide whether, in view of the above, he wishes to have a new trial. If, within that month, he files a written elec-

tion to do so, there should, I think, be judgment allowing the appeal, and setting aside the nonsuit in the Court below, and ordering a new trial. Costs of the trial already had, and of the appeal, to abide the event of such new trial. If the plaintiff does not so elect within such month, the appeal should, in my opinion, be dismissed with costs.

MATHERS, J.:—The defendants, in surveying a branch of their railway from Neepawa to Carberry in August, 1903, cut down some of the trees in a grove near the plaintiff's house. For the damages thus done, the plaintiff brought this action in the County Court of Carberry. The learned County Court Judge found that the defendants had done no more damage than was necessary, and nonsuited the plaintiff on the ground that his only remedy was for compensation under the Railway Act. From this judgment the plaintiff appeals.

The damage having occurred in 1903, the rights of the plaintiff are to be determined according to the provisions of the Railway Act of 1888. By section 90 of that Act, sub-section (a), it is provided that the company may enter "into and upon the lands of any person whomsoever, lying in the intended route or line of railway; and make surveys, examinations or other necessary arrangements on such lands for fixing the site of the railway, and set out and ascertain such parts of the lands as are necessary and proper for the railway."

I think the proper construction of that provision must be that the defendants had the right, subject to section 92 of the Act, to do whatever was necessary to be done to enable them to properly and efficiently make the surveys and examinations where authorized. If, in exercising the powers conferred by that section, it was necessary to cut an opening through the plaintiff's grove of trees, I cannot arrive at any other conclusion than that they had statutory authority for so doing. On this question the learned County Court Judge has made no express finding. He has found as a fact that no greater damage than was necessary was done, but clearly his finding is based on the assumption that

it was necessary to go through the grove. He does not seem to have considered nor was the evidence directed to the possibility of going around it. If it were possible to efficiently exercise the powers conferred by section 90 without cutting the plaintiff's trees, then, I think, the County Court has jurisdiction to try the action. Otherwise the plaintiff's remedy is under the statute.

It is well settled that if damage result from the exercise of statutory powers, and if the damage is not owing to any negligence in the mode of exercising or carrying into effect the powers given by the Act, then the person who is injuriously affected by that which has been done must either find in the Act something which gives him compensation or he is entitled to none: *Canadian Pacific R.W. Co. v. Roy* (1902), A.C. 220; *Rex v. Pease*, 4 B. & A. 39; *Bennett v. G.T.R.*, 2 O.L.R. 425, and cases collected in 1 Can. Ry. Cas. 454. What the Legislature has seen fit to make lawful cannot be an actionable wrong, and compensation only can be obtained if the Legislature has so provided and then only in the manner specified. By section 92 of the Act in question, it is provided that "the company shall, in the exercise of the powers by this or the Special Act granted, do as little damage as possible, and shall make full compensation, in the manner herein and in the Special Act provided, to all parties interested, for all damage by them sustained by reason of the exercise of such powers." Section 146 and subsequent sections make provision for determining the compensation by arbitration. These sections are in terms more applicable to a case where land is actually to be taken for the use of the railway, but I see nothing to prevent their reasonable application of the compensation provided for in section 92. It was argued that the deposit of the map or plan and book of reference in the office of the Registrar of Deeds under section 144 was the starting point of the arbitration proceedings and until that was done the provisions of the subsequent sections could not be invoked. It does not appear whether the plan or book of reference have or have not been deposited, so that we are not in a position to say whether or not the difficulty suggested by plaintiff's counsel does or does not

arise in this case. The defendants could not, however, by a neglect to file the plan and book of reference, deprive the plaintiff of the right to have his compensation assessed in the manner provided by the Act. If such a case did arise, I have no doubt the Court on a proper application for that purpose would compel the defendants to take the necessary steps to have the compensation determined in the manner provided by section 146 and subsequent sections. As stated by Chancellor Boyd in *Todd v. Town of Meaford*, 6 O.L.R. 476: "The remedy under the Act, if the railway took no further step, is, to have a mandamus requiring them to appoint an arbitrator under section 146 to proceed to fix the amount of compensation."

Similar views are expressed by Sir Montague Smith in *Jones v. Stanstead*, L.R. 4 P.C. page 122, as follows: "If in such a case the company did not, on application, take steps to appoint an arbitrator and proceed to arbitration, the claimant might take proceedings by way of mandamus to compel them to give the notice provided by the Act, or to appoint an arbitrator."

In my opinion, therefore, there ought to be a new trial if the plaintiff so elects within a month, costs of the trial already had and of this appeal to follow the event of the new trial.

If he does not so elect, appeal to be dismissed with costs.

(See next case.)

TRESPASS—DAMAGES—TRIAL LINE.

MANITOBA.]

[COURT OF APPEAL

BARRETT V. CANADIAN PACIFIC R.W. COMPANY.

(16 Man. L.R. 558.)

Railway Act, 1888, secs. 90, 92, 146—Action for damages for cutting down trees in running trial line—When remedy limited to arbitration—Damage resulting from excess or negligence in exercising statutory powers.

At the new trial ordered in the foregoing case, the County Court Judge again nonsuited the plaintiff who appealed to the Court of Appeal. *Held*, that the evidence shewed that it was unnecessary to cut down the trees for the purpose of running the required trial line and that the plaintiff was entitled to recover in the action, and that judgment should be entered for him for \$250.00 damages and costs of both trials and both appeals.

AFTER the judgment of the full Court, reported in the foregoing case, a new trial was had in the County Court of Carberry before Judge Ryan who gave judgment in which he stated that he was still of the opinion entertained at the conclusion of the trial, that the plaintiff had chosen the wrong method of recovering his damages. The servants of the defendant company had, under the Acts of Parliament referred to, the right to enter upon the plaintiff's land for the purpose of doing what the plaintiff complained of and, as he could not find upon the evidence that they had done any greater damage than was necessary, it seemed to him that the damages could only be recovered in the way provided by the Act and that the County Court was without jurisdiction in the matter.

From the decision the plaintiff appealed.

1906. Oct. 9th. *J. E. O'Connor* for plaintiff, appellant. If it was physically possible to have made the survey without doing damage, the company were bound to avoid doing damage and the evidence shews it was physically possible to have made the survey without cutting the trees. Even if physically impossible to

avoid cutting, before the company can enter and cut the trees there must first be compensation: *Ontario & Quebec R.W. Co. v. Taylor*, 6 O.R. 345; *McArthur v. Northern R.W.*, 15 O.R. 733; *Parkdale v. West*, 12 A.C. 602; *North Shore v. Pion*, 14 A.C. 612; *Saunby v. Water Commissioners*, 22 T.L.R. 37; *Bigaouette v. N.S.R.*, 17 S.C.R. 363; *Hendrie v. Toronto, Hamilton & Buffalo R.W. Co.*, 27 O.R. 46; *Mason v. South Norfolk*, 19 O.R. 132.

A. S. Bond for defendants, respondents. If cutting of trees was incidental to the building of the line the company has power under section 90, sub-section (a). Section 125 of the Act of 1888 speaks of depositing maps or plans relating to the district or country "through which the railway is to pass." That implies that the location line must be run before the plan is prepared: *Harrison v. Southwark* (1891), 2 Ch. 409; *Jackson v. G.T.R.*, 32 S.C.R. 245; *Attwood v. Emery*, 26 L.J. C.P. 73.

1906. Oct. 6th. Appeal allowed with costs, the judgment for the defendants in the County Court set aside and judgment entered in that Court, for the plaintiff for \$250 with costs of both trials. Cost of the first appeal also to be paid by the defendants to the plaintiff.

Howell, C.J.A., expressed the opinion that if a railway company entered upon lands, which they had power to do under a statute, any work done must be done subject to the rights of other people. The statute says "do as little damage as possible." In this case the surveyors cut down trees around the plaintiff's house. Defendants exceeded their powers and so action lies.

DAMAGE IN EXERCISE OF CORPORATE POWERS— RIGHT TO SUE.

The cases now reported of *Barrett v. Canadian Pacific R.W. Co.* illustrate again the principle that where a railway company exceeds its corporate powers action may be brought to recover damages and the person injured is not restricted to the right given by the statute to apply for the appointment of arbitra-

tors in order to fix compensation for the injury done in the exercise of corporate powers. The subject is fully discussed in the Canadian Railway Act (Annotated) at pages 170 to 176 and pages 183 and 184. The section of the statute referred to by Howell, C.J.A., where he quotes the words "do as little damage as possible," is 3 Edw. VII. ch. 58, sec. 120, now R.S.C., ch. 37, sec. 155. The wording of that section draws a clear distinction between damages for which an action would lie and damages for which compensation must be made as it goes on to provide that compensation must be made as provided by the section "for all damages sustained by reason of the powers conferred by statute" whereas any avoidable damages would be damages not by reason of the proper exercise of the powers conferred by the statute, but by reason of some improper exercise of the powers conferred by such statute. As mentioned in the Canadian Railway Act (Annotated) pages 172 and 183, while railway companies are by necessary implication from the statutes conferring their powers upon them, protected from actions for damages in the lawful and proper exercise of such powers, such protection is not accorded to companies whose powers are conferred upon them by charter without anything being said as to the remedy which is to be exercised in case of damage suffered by the exercise of such powers, and it has been laid down that in the last named class of cases the company must so exercise its charter rights as not to create a nuisance or cause injury to others, and that if it does so it is liable to anyone injured thereby.

In addition to the cases cited in those notes, see *Montreal St. R.W. Co. v. Boudreau*, 36 S.C.R. 239; *Dumphy v. Montreal Light, Heat and Power Co.*, Q.R. 28 S.C. 18, *Montreal Heat, Light and Power Co. v. Dumphy*, Q.R. 15 K.B. 11, and *Dumphy v. Montreal Heat, Light and Power Co.*, 23 Times L.R. 770.

TRESPASS—DAMAGES—COMPENSATION.

CANADA.]

[SUPREME COURT.

TEMISCOUATA R.W. Co. v. CLAIR.

(38 S.C.R. 230.)

Appeal—Order extending time—Jurisdiction—R.S.C. ch. 135, sec. 42—Practice — Trespass — Possession — Evidence — Expropriation — Railway.

The Court refused to entertain a motion to quash the appeal on the ground that it had not been taken within the sixty days limited by the statute and that an order by a Judge of the Court appealed from after the expiration of that time was *ultra vires* and could not be permitted under section 42 of the Supreme and Exchequer Courts Act, R.S.C. ch. 135.

The casual use of land for pasturing cattle in common with other persons does not constitute evidence of possession sufficient to maintain an action for trespass.

Judgment appealed from, 1 East. L.R. 524, *ante*. p. 171, reversed.

PRESENT:—Fitzpatrick, C.J., and Davies, Idington, MacLennan, and Duff, JJ.

APPEAL from the judgment of the Supreme Court of New Brunswick, 1 East. L.R. 524, *ante*. p. 171, refusing to set aside a verdict for the plaintiff and enter a nonsuit or make an order for a new trial.

The action was for trespass by the railway company by constructing and operating their railway across lands in the Parish of St. Hilaire in the County of Madawaska, N.B., without taking proceedings for its expropriation and making compensation for the land taken by the company for their line of railway. The company denied the plaintiff's title and also contended that, even if he was in possession of the land in question at the time of their entry and the construction of the railway thereon, he had acquiesced and stood by without objecting for fifteen years before action and that he could not, at so late a date, bring an action for trespass or claim damages.

Upon the answers of the jury to questions put to them at the trial, Mr. Justice Landry entered judgment in favour of the plaintiff and gave him damages assessed at the rate of ten

dollars per annum for the six years preceding the institution of the action.

By the judgment appealed from the Supreme Court of New Brunswick, in banc, refused to set the verdict aside and enter a judgment of nonsuit or to order a new trial.

The judgment in the Court below was rendered on the 15th of June, 1906, and notice of appeal to the Supreme Court of Canada was given on the 21st June, 1906. No proceedings towards the prosecution of the appeal were taken until the 17th of August, 1906, when a summons was taken out, returnable on the 23rd of that month, to settle the case on appeal and, on 27th August, 1906, Mr. Justice McLeod, one of the Judges of the Court appealed from, made an order under section 42 of the Supreme and Exchequer Courts Act, granting leave for the appeal and approving the security bond filed by the appellants.

On the present appeal coming on for hearing a motion to quash was made on the ground that the appeal had not been properly taken within the sixty days limited by the statute and that the order so made by Mr. Justice McLeod, after the expiration of the sixty days, was *ultra vires* and could not then be made under or in virtue of said section 42.

1906. Dec. 18, 19.

Hazen, K.C., for the motion.

Stevens, K.C., *contra*.

The Court ordered that the appeal should be heard upon the merits.

The questions at issue on the appeal are stated in the judgment now reported.

Stevens, K.C., for the appellants.

Hazen, K.C., for the respondent.

The judgment of the Court was delivered by

December 26, 1906. DAVIES, J.:—At the conclusion of the argument I was strongly of the opinion that the plaintiff (respondent), whose only claim to the lands, for trespass upon which he brought this action, was alleged possession, had entirely failed to make out a case to go to the jury and should have been nonsuited. Mr. Hazen, for the respondent, submitted that there was some evidence, however slight, for the jury and urged very strongly that the evidence subsequently given by the appellants shewed that there had been some negotiations on the part of the railway company with the plaintiff to buy out his claim, and that the Government of New Brunswick had a year or two ago recognized plaintiff's claim to the remainder of the block of land not taken by the railway company, and that all this evidence, combined with the plaintiff's user of that block of land for the last fourteen or fifteen years, together constituted sufficient evidence to warrant the finding of the jury that, at the time the railway company entered upon and took possession of the strip of land required by them for the track of their railway the plaintiff was in possession of it.

The question upon which the case largely, if not entirely, turned was whether or not the plaintiff was at the time of the taking of the land in question by the railway company its actual possessor. If he was not, then no other question need be considered and he must be nonsuited.

The evidence shews to my mind, beyond any doubt, that plaintiff was not only not in possession of the land at the time referred to, but that he knew that he was not, and that it was not till many years afterwards that the idea first entered into his mind that he could have any claim for damages for the land against the appellants. In his evidence he says he was working with Ritchie, a sub-contractor of the railway, near, but not on, the locus and goes on to say: "There was no question about them taking possession. I never said a word. I didn't think I had possession of the point at the time."

And then, being asked the question:

" Q.—And you didn't think so until just here about a year ago when this question came up about selling it to the Government? "

" A.—Yes. I had a notion two or three years ago, four or five years ago. I always thought I would try and get my pay out of them. I have had that in my mind the last seventeen years, and Mr. Laforest was going around getting persons to sign the deeds, and Denis Hebert, next door neighbour, paid him a hard \$100."

Later, being asked as to whether Daniel Chisholm was not in possession at the time the railway was built, he said:

" Yes; when I would go on there, Chisholm wouldn't interfere with me and I didn't with him. I knew my father gave Chisholm permission to go on and use the point and I didn't interfere with Chisholm and he didn't with me. I guess everybody had a hand in the soup then; they would go on there and I didn't bother any body and nobody bothered me.

Not a single overt act of possession was attempted to be proved by plaintiff before and up to the time the railway company entered beyond the vague claim that he had used the land for pasture one summer in common with Chisholm and others. As the land was vacant and admittedly being used also for pasture by Chisholm and others at the same time, it would be difficult to hold such vague evidence of casually pasturing cattle on it as evidence of possession.

The fact was that such evidence as there was of actual possession in any one of the land in question at the time the railway entered shewed it to have been in Chisholm who paid rent for it to another man.

Chisholm left there and abandoned the possession in 1893, two years after the railway company had entered and built their track and with respect to such part of the " point " as the railway company had not taken, it was after that possessed and occupied by plaintiff.

Such rights as he had in these lands outside of the railway belt and specially excepting the belt, were purchased from the

plaintiff by the provincial Government about a year or more before this action was commenced.

It would be impossible, however, to infer possession by the plaintiff of the railway belt at the time the railway company entered on the land under the evidence given by the plaintiff himself, from the subsequent user by him of the remainder of the land or from the purchase of his squatter's rights in such remainder by the Government.

His possession previously to defendant's entry seems to have been purely imaginary and such as he did have arose subsequently and never embraced the railway track which has been fenced off for the past fifteen years or more. The finding of the jury on the point was not one which reasonable men could fairly have come to under the evidence and must be set aside and the appeal allowed with costs and a judgment of nonsuit entered as proposed by Chief Justice Tuck in the Court below.

Appeal allowed with costs.

Solicitors for the appellants: *Stevens & Lawson.*

Solicitors for the respondent: *Laforest & Jones.*

RAILWAY CONSTABLE—MALICIOUS ARREST.

ONTARIO.]

[DIVISIONAL COURT

THOMAS v. CANADIAN PACIFIC R.W. Co.

BUSH v. CANADIAN PACIFIC R.W. Co.

(14 O.L.R. 55.)

Master and Servant—Railway Watchman—Railway Constable—Scope of Authority—Malicious Arrest—Dominion Railway Act, 1903, sec. 241.

A watchman of the defendant company, who was also a constable appointed on their application under sec. 241 of the Dominion Railway Act, 1903, 3 Edw. VII., ch. 58 (D.), arrested the plaintiffs at a spot about half a mile from the railway line, and swore out an information against them for breaking into a freight car with intent to steal. The evidence failed, and they were discharged, and brought this action for false arrest and malicious prosecution:—

Held, that the defendant company was not liable because the watchman in his capacity as such had no authority express or implied, either to arrest or prosecute the plaintiffs under the circumstances; and as constable, he was to be regarded as an officer of the law, and not as a servant of the company, and there was no evidence that the defendant company exercised any control over his action as constable.

THE above were actions brought against the Canadian Pacific Railway Company for false arrest and malicious prosecution of the plaintiffs, and were tried before His Honour Judge Morgan, Junior Judge of the county of York, on March 9th, 1906. At the close of the plaintiff's case the learned Judge dismissed each action, and from these judgments the plaintiffs now appealed.

The appeals were argued together on May 15th, 1906, before MULOCK, C.J., Ex.D., and BRITTON and MABEE, JJ.

W. T. J. Lee, contended that the fact of a man being in the position of a constable does not prevent his employer being responsible for his illegal acts; that *O'Donnell v. Canada Foundry Co.* (1905), 5 O.W.R. 215, 477, was a different case, as Jardine was not a county constable, but was employed and paid by the defendants, and was down in their books as a watchman: The

Railway Act, 1903, 3 Edw. VII. ch. 58, sec. 241 (D.); *Cullimore v. Savage South Africa Co.*, [1903] 2 Ir. 589; *Goff v. Great Northern R.W.Co.* (1861), 3 E. & E. 672.

Shirley Denison, for the defendants, being then called on, contended that Jardine had no authority either express or implied to make the arrest; that as constable he was a servant of the Crown, not of the defendants; that the defendants were not liable merely because Jardine may have pretended to make the arrest in their interest: *Dennison v. Canadian Pacific R.W. Co.* (1903), 36 N.B. 250; *O'Donnell v. Canada Foundry Co.*, 5 O.W.R. 215, which was a stronger case for the plaintiffs than here; that the defendants were not liable when anyone—whether servant of theirs or not—did, without instructions, something which they could not possibly have rightfully done: *Hanson v. Waller*, [1901] 1 Q.B. 390, 393; *Poulton v. London & South-Western R.W. Co.* (1867), L.R. 2 Q.B. 534, which might be contrasted with *Moore v. Metropolitan R.W. Co.* (1872), L.R. 8 Q.B. 36; *Emerson v. Niagara Navigation Co.* (1883), 2 O.R. 528; *Abraham v. Deakin*, [1891] 1 Q.B. 516; *Stedman v. Baker & Co.* (1896), 12 Times L.R. 451.

Lee, in reply, referred to sec. 3 of the Railway Act, 1903, as giving a railway company larger powers of arrest than it would have at common law: 3 Can. Ry. Cas. at p. 373; and contended that the case should have been left to the jury.

June 20, 1906. MULLOCK, C.J.:—These are actions brought against the Canadian Pacific Railway Company for false arrest and malicious prosecution of the plaintiffs, and were tried before His Honour Judge Morgan, junior Judge of the county of York, on March 9th, 1906. At the close of the plaintiff's case the learned Judge dismissed each action, and from these judgments the plaintiffs now appeal.

The facts material to these appeals as disclosed at the trial are as follows:—

One James Jardine was a watchman of the defendant company, and, under the provisions of sec. 241 of the Railway Act, 1903, had apparently been appointed constable to act upon and

along the line of the Canadian Pacific Railway. This section provides that such an appointment may be made on the application and recommendation of the railway company desiring it, and requires the person so appointed to take an oath or declaration in the form or to the effect therein set forth. In the present instance Jardine, on April 29th, 1904, made oath to his appointment, and on September 2nd, 1904, caused this affidavit to be filed in the office of the clerk of the peace for the county of York. It does not appear when he ceased to be such constable, and it may be assumed that he was still constable at the time of the arrest and prosecution in question.

There is evidence from which the jury might have concluded that Jardine was in the defendants' employ as watchman on Sunday, December 11th, 1904. On the evening of that day he met the plaintiffs near the corner of King and Jordan Streets in Toronto, when he seized them both, saying "I want you," and marched them off to the police station. On arrival there he handed them over to the sergeant in charge, saying, "here's two more." The plaintiffs were detained in custody until the following Wednesday. On December 13th Jardine swore to an information charging the plaintiffs with having broken into a freight car of the defendants with the intent of stealing therefrom, in this information describing himself as "James Jardine, C.P.R. Constable of the City of Toronto." The plaintiffs were remanded until December 16th when their cases were proceeded with. On this inquiry Jardine swore that he was a C.P.R. constable, and that a freight car of the C.P.R. in Toronto had been broken into, but his evidence in no way connected the plaintiffs with the matter, and they were thereupon discharged, and this action is brought because of Jardine's part in the arrest and prosecution in question.

In order to establish liability against the defendants, it is not sufficient to shew merely that Jardine was in their employment, but the plaintiffs must shew that he acted with their authority, express or implied. In *Roe v. Birkenhead & Lancashire & Cheshire Junction R.W. Co.* (1851), 7 Exch. 36, Pollock, B., says, at p. 40: "The rule is the same between a private individual and a railway

company, as it is where the same matter is in dispute between two private individuals. The general rule is, that a master is not liable for the tortious act of his servant, unless that act be done either by an authority, express or implied, given him for that purpose by the master. If it had appeared in the present case that the act complained of was one which the company had legal authority to perform, the act would not have been tortious, and it might well have been put to the jury as having been done by an authority given by the company. But there was no evidence whatever that the act was of that character, and therefore, as the case stands, we must take it to be a tortious act. It therefore follows that the plaintiff was bound to shew that the person by whom he was arrested was not only the servant of the company, but also that he had their authority to arrest him. Now I think that although there may have been some evidence that Phillips was in the service of the company, there was no evidence that he had any previous authority from the company to take the plaintiff into custody."

It was not attempted to be shewn that Jardine had any express authority, and the onus is upon the plaintiffs to give evidence justifying the jury in finding that, from the nature of his duties, he had implied authority from the defendants to make the arrest: *Goff v. Great Northern R.W. Co.*, 3 E. & E. 672, 674.

Jardine was at the same time watchman for the defendants and constable appointed under the statute with such duties and powers as the Act conferred upon him.

This dual position involves a consideration of his implied authority in each capacity. As watchman, deriving authority from the company, it was his duty to protect the property on their premises which they had entrusted to his care, and he was thus clothed with implied authority from them to do such reasonable acts as he might, on the exigency of the moment, deem necessary, in order to prevent injury to their property.

If, therefore, he had found the plaintiffs on the premises of the defendants, endeavouring to steal the property placed by them under his charge, it would have been within the scope of his authority, as their servant, to arrest them if he deemed it advisable to do so,

in order to perform his duty as watchman, of preventing injury to the property in question. But such was the limit of his implied authority, and any acts of his in excess of such authority would not bind the defendants: *Poulton v. London & South-Western R.W. Co.*, L.R. 2 Q.B. 534, 540; *Lyden v. McGee* (1888), 16 O.R. 105, 108.

In *Abraham v. Deakin*, [1891] 1 Q.B. 516, the court (at p. 521) adopted as a correct exposition of the law the view expressed in *Bank of New South Wales v. Owston* (1879), 4 App. Cas. 270, "that the mere fact that a man was the manager of a bank did not confer upon him an implied authority to give a man into custody for stealing a bill of exchange when the act was past and gone, and the arrest of the offender was not necessary for the protection of the property of the bank, but was made only for the purpose of punishing him and vindicating the law."

In *Poulton v. London & South-Western R.W. Co.*, *supra*, Blackburn, J., says, at p. 540: "Having no power themselves, they cannot give the station-master any power, to do the act. Therefore, the wrongful imprisonment is an act for which the plaintiff, if he has a remedy at all, has it against the station-master personally, but not against the railway company;" and in the same case Mellor, J., says (*ib.*): "I am entirely of the same opinion. I think the distinction is clear; it limits the scope of authority, to be implied from the fact of being the station-master to such acts as the company could do themselves, and I do not think it ever can be implied that the company authorized the station-master to do that which they have no authority to do themselves; and that seems to me to be the boundary line. . . . If the station-master had made a mistake in committing an act which he was authorized to do, I think in that case the company would be liable, because it would be supposed to be done with their authority. Where the station-master acts in a manner in which the company themselves would not be authorized to act, and under a mistake or misapprehension of what the law is, then I think the rule is very different; and I think that is the distinction on which the whole matter turns;" and Shee, J., in the same case says: "an authority cannot be implied to have been given to a servant to do an act, which, if his

master were on the spot, the master would not be justified in doing, on the assumption of a particular state of facts."

Here the arrest was made after the attempted robbery, and on a public street some distance from the defendants' premises, and on the following day Jardine swore to an information charging the plaintiffs with having endeavoured to break into a freight car with intent to steal therefrom. There was no evidence that anything, in fact, had been stolen. The defendants' property was safe before the arrest. Therefore, that act and the subsequent events complained of were not in the interest of the company, either for the purpose of preventing a theft or of recovering stolen property, but were simply punitive in their character, in vindication of the law, an object in which the company in common with the general public was interested.

Under the Railway Act the company had no authority to do what Jardine had thus done, and it ought not to be inferred that the company had conferred on him authority to do what it could not itself lawfully do: *Allen v. London & South-Western R.W. Co.* (1870), L.R. 6 Q.B. 65; unreported case of *Jones v. Duck*, *The Times*, March 16th, 1900.

I therefore think that, as watchman, Jardine had no implied authority from the defendants, either to arrest or prosecute the plaintiffs, and that the defendants are not liable therefor.

The next question is whether, assuming that the arrest and prosecution were made by Jardine in his capacity of constable, the defendants are liable therefor. At their instance he was, under the provisions of sec. 241 of the Railway Act, 3 Edw. VII. ch. 58, appointed to act as constable on and along their railway.

Sub-section 2 empowers a person so appointed to "act as a constable for the preservation of the peace, and for the security of persons and property against unlawful acts on such railway, and on any of the works belonging thereto. . . . and in all places not more than a quarter of a mile distant from such railway, and shall have all such powers, protections and privileges for the apprehending of offenders, as well by night as by day, and for doing all things for the prevention, discovery and prosecution

of offences, and for keeping the peace, which any constable duly appointed has within his constablewick."

Sub-section 6 enacts that "every such constable who is guilty of any neglect or breach of duty in his office of constable, shall be liable, on summary conviction . . . to a penalty not exceeding eighty dollars, or to imprisonment, . . . Such penalty may be deducted from any salary due to such offender, if such constable is in receipt of a salary from the company."

There was no evidence that the defendants gave any instructions or directions to Jardine in the discharge of his duties as constable at any time. On the contrary, they appear to have wholly abstained from interfering with him, leaving him to perform, in accordance with his own judgment, the duties cast upon him by the statute.

Thus Jardine having no express authority from the defendants to make the arrest and lay the information, they would not be liable unless an implication of authority would arise because of their having brought about his appointment as constable.

In *Hart v. City of Bridgeport* (1876), 13 Blachford Circuit Court Rep. 289, 294; *Eastman v. Meredith* (1858), 36 N.H. 284; *Maximilian v. Mayor, etc., of New York* (1875), 62 N.Y. 160; *Baker v. West Chicago Commissioners* (1896), 66 Ill. App. 507, and numerous other cases that have come before the courts of the United States, the view has been expressed that the preservation of the peace, protection of property, prevention and punishment of crime, are public duties in the discharge of which the whole community is interested and which the State is bound to perform for the benefit of society generally, and that if for convenience the State delegates to municipalities the power of appointing peace officers, these latter in the exercise or non-exercise of their police powers, are not servants or officers of the municipalities, which may have appointed them, but which have no control over them in the discharge of their duties.

For the like reason such peace officers appointed on the recommendation under the authority of competent legislation by a rail-

way company, must be regarded as officers of the law and not as servants of the company.

Under the Act in question, whilst the railway may apply to the authorities to appoint constables, and 'may in that connection make recommendations of persons for appointment, it has no power to appoint, the Act vesting that power in justices of the peace, members of the judiciary, and other public functionaries.

The statute declares what shall be the duties, powers and privileges of these constables, and imposes upon them the obligation of performing their duty, under heavy penalty in case of neglect, and provides for their dismissal by any county court, superior court Judge, etc.; the only interference allowed by the statute to the company being to dismiss "any such constable who is acting on such railway."

Thus, a constable, on his appointment, derives his authority from the statute not from the company, and is bound by the statute, even against the wishes of the company, to perform the duties cast upon him by the statute.

Unless, therefore, the company should actively interfere by directing his movements, he is no more an agent of the company than would he be if at the request of a private citizen he were detailed by his superior officer to guard a man's private property.

There is no evidence to shew that in either of these cases the defendants exercised any control over Jardine's action as constable, and therefore as held in *O'Donnell v. Canada Foundry Co.*, 5 O.W.R. 216, they are not liable therefor.

In *Dennison v. Canadian Pacific R.W. Co.*, 36 N.B.R. 250, 253, Macleod, J., expressed the view that a railway company, simply because of procuring the appointment of a constable under the Act, did not thereby become responsible for his action as constable.

I think the appeal should be dismissed with costs.

MARTEE, J., concurred.

BRITTON, J.:—I agree with the decision of the Judge of the county court before whom these actions were tried, and also with

the learned Chief Justice of the Exchequer Division, that there was no evidence against the defendants that could properly be submitted to a jury.

The mere fact that Jardine was in the employ of the defendants at the time the arrest was made, assuming for the purpose of these cases that he was then so employed, is not sufficient to connect the defendants with the arrest.

The fact that Jardine was, while in the employ of the defendants, a constable, and that he had been appointed a constable at the request of defendants, under sec. 241 of the Railway Act, for duty upon and along the line of defendants' railway, is in no way sufficient to make defendants even *prima facie* liable for the arrest complained of.

Nothing was shewn as to any previous act of Jardine, or as to any general instructions to him, or as to any definition of his duties, from which it could be inferred that the defendants authorized an arrest not made on or adjacent to defendants' line of railway, or upon any of defendants' premises.

There was no evidence of approval or ratification by defendants of the acts of Jardine.

I agree that appeal should be dismissed with costs.

NOTE.

The case of *Dennison v. Canadian Pacific R.W. Co.*, cited in the above judgment is also reported in 3 Can. Ry. Cas. 368 and reference may be made to the notes at the end of that case at pages 374 and 375 for cases upon the liability of companies for damages for false arrest or malicious prosecution. For other recent decisions upon the subject of malicious prosecution see *Still v. Hastings*, 13 O.L.R. 322; and *Baxter v. Gordon Ironsides & Fares Co.*, *ib.* 598. Section 241 of the Railway Act, 1903, are now sections 300, 301, 302, 303, 304 and 305 of the Railway Act, 1906, R.S.C. ch. 37.

MUNICIPAL FRANCHISE—CONSTRUCTION OF
CONTRACT.

ONTARIO.]

[COURT OF APPEAL.

CORPORATION OF THE CITY OF TORONTO

v.

TORONTO RAILWAY COMPANY.

(12 O.L.R. 534.)

Street Railways—Toronto Railway—Streets in Newly Annexed Territory—Extension of Road Into—Stopping Places—Right to Fix—Determination of Engineer.

Section 14 of the agreement entered into between the plaintiffs and defendants, set out in 55 Vict. ch. 99 (O.), whereby the defendants are required to establish and lay down new lines and to extend the tracks and street car service on such streets as may be, from time to time, recommended by the city engineer and approved by the city council, does not apply to territory which was not within the limits of the city at the date of the agreement; but has subsequently been annexed to and become part thereof.

Toronto R.W. Co. v. City of Toronto, 37 S.C.R. 430 (reversing the judgment of the Court of Appeal, 10 O.L.R. 657), followed.

By sec. 26 of the agreement the "speed and service" necessary on each main line, part of same, or branch, is to be determined by the city engineer and approved by the city council; and by sec. 39 the cars shall only be stopped clear of cross streets and midway between streets, where the distance exceeds six hundred feet:—

Held, subject to the limitations of clause 39, that the regulating of the places at which cars shall be stopped came within condition 26 relating to the speed and service, and was therefore to be determined by the city engineer and approved of by the council.

The engineer made a report to the council recommending that cars should be required to stop at certain specified points, which was adopted by resolution of the council:—

Held, that the engineer did not occupy a judicial or quasi-judicial position between the parties to the agreement, and was not bound to consult with the defendants before determining what service should be supplied, and that such report, though somewhat informally expressed, was a sufficient determination on the part of the engineer, and that the adoption by resolution was sufficient, it not being essential that such adoption should be by by-law.

Held also, that the plaintiffs were entitled to an order restraining the defendants from running the cars upon their railway, except in accordance with the determination of the engineer as to the stopping places.

THIS was an appeal by the defendants from the judgment of Street, J., at the trial, reported 11 O.L.R. 103, 5 Can. Ry. Cas. 278, where the facts are fully stated.

On February 18th and 19th, 1906, the appeal was heard before Moss, C.J.O., OSLER and GARROW, JJ.A.

Wallace Nesbitt, K.C., and *W. Laidlaw*, K.C., for the appellants. The first question is whether the railway company are under the agreement with the city bound to lay down tracks on streets which were not within the limits of the city when the agreement was entered into, but were afterwards brought within it. The agreement must be looked at in the light of what was in the contemplation of the parties at that time. It is a most important point for the company, for on its decision depends their liability to extend their tracks into all newly annexed territory, and it is well known that the village of East Toronto and the town of West Toronto Junction are making overtures to the city to be annexed. Our contention is that the agreement is limited to the area comprised within the city limits, as they existed when the agreement was entered into. The conditions of sale, the tender made, and the whole tenor and effect of the agreement shew that it was so limited. In the case of *The City of Toronto v. The Toronto R.W. Co.*, known as the mileage case, the judgments of the Master, the Divisional Court and Court of Appeal are to be found in 2 O.W.R. 225, 3 O.W.R. 204, and 5 O.W.R. 130, respectively. The judgment of the Court of Appeal was subsequently affirmed by the Privy Council, 22 Times L.R. 32, (1906) A.C. 117. The point in that case was merely as to the right of the city to charge mileage on that part of Queen street, west of Roncesvalles avenue, and involves a different object and purpose and raises a different question for determination. All it decided was that the company, having laid its rails on that part of Queen street without having obtained any authority from the city to do so, must be assumed to have been acting under the agreement. Any observations of the Court of Appeal which would tend to shew that any liability was imposed as to newly annexed territory were *obiter dicta*. In the special case between the same parties before Anglin, J., this Court acted on the assumption that the point had been determined by their judgment in the previous case, and the judgment of Anglin, J., was affirmed without argument. The case of *Montreal v. Montreal R.W. Co.* (1904), 34

S.C.R. 459, reversed in the Privy Council, is in the appellant's favour. There it was held that the city was not entitled to percentages on streets without the city limits. The agreement implies that the expression "city of Toronto" would not include after annexed territory, as it expressly provides what is to be done in such case. The city council as it existed when the agreement was entered into had no power to bind subsequent councils as to after annexed territory. It will not be assumed, therefore, that the company would be parties to an act which would be *ultra vires* of the city. The validating Act must be treated as a matter of contract, so that it has the effect of validating only what, as appears from the agreement, there was a clear intention to provide for: *Davis v. Taff Vale R.W. Co.*, [1895] A.C. 542, 552-3; *Caledonian R.W. Co. v. North British R.W. Co.* (1881), 6 App. Cas. 114, 126; *Countess of Rothes v. Kirkcaldy Water Commissioners* (1882), 7 App. Cas. 694, 707. Then looking at clauses 15 and 21 of the agreement, and 14, 16, 17 and 24 of the conditions, it is quite clear that the liability only extended to streets within the city when the agreement was entered into: *Pedlar v. Road Block Gold Mines of India*, [1905] 2 Ch. 427. Can it be fairly argued that an agreement which deals with the city of Toronto only, can be held to extend to whatever territory the city may subsequently choose to bring within its limits, and then no matter how unprofitable an extension of the railway into the annexed territory may be, still the city can compel the company to build it. No sane business men would for a moment assume such a liability. Suppose, for example, a person was to enter into an agreement to build houses on vacant lots in the city, would he not be rather astonished to find that he contracted to build on large tracts of vacant land, miles in extent, because the city had seen fit to subsequently enter into arrangements to annex such territory? Then as to the stops. This is covered by clause 39. The trial Judge seemed to think this must be read in conjunction with clause 26, which deals with "speed and service." If such were the case clause 39 would be wholly unnecessary. Each deals with a distinct subject matter. The engineer's authority is limited to the powers

conferred by sec. 39. But assuming sec. 26 does apply, the engineer has not brought himself within it. There must be a determination. All that he has done here is to recommend. Recommending is not determination. "Recommend" has a different meaning, as appears from conditions 11 and 14. "Determination" includes hearing and consideration. In this capacity he exercises a judicial function. He is in the position of a quasi arbitrator, and both sides had a right to be heard before him. He cannot act *ex parte*: *Wadsworth v. Smith* (1871), L.R. 6 Q.B. 332, 337; *Chambers v. Goldthorpe*, [1901] 1 Q.B. 624, 638-9; *Hudson on Building Contracts*, 2nd ed., 256. Then, there was no approval by the city. Their assent could only be by by-law, a resolution was not sufficient: *Liverpool and Milton R.W. Co. v. Town of Liverpool* (1903), 33 S.C.R. 180. The case of *The Town of Pembroke v. Canada Central R.W. Co.* (1882), 3 O.R. 503, is distinguishable. In that case there was not only the resolution of the council, but their acquiescence for over five years. The case of *Port Arthur High School Board v. Town of Fort William* (1898), 25 A. R. 522, 527, is also distinguishable. The appointment of the school board was under powers conferred by the High Schools Act, 48 Vict. ch. 50 (O.), and it was pointed out that there was nothing in the Act requiring the appointment by by-law. Then can the Court issue a mandatory order in case of the refusal of the company to lay down their tracks on such outside territory? The statute does not carry the matter any further than that which existed when the case of *The City of Kingston v. Kingston, Portsmouth and Cataraqui Electric R.W. Co.* (1898), 25 A.R. 462, was decided. The case of *City of Hamilton v. Hamilton Street R.W. Co.* (1904), 8 O.L.R. 642, is distinguishable. There the question was as to the sale of limited tickets. The Court held that the company were obliged to sell such tickets, and having refused to do so, it was held they might properly be restrained from running cars on which such tickets were not sold. Here it is asked that the whole system should be stopped, because an extension of the road has not been built.

Fullerton, K.C., and *W. Johnston*, for the respondents. To determine the effect of the agreement as to subsequently annexed

territory, the meaning of the words "city of Toronto" as contained in the agreement must be considered. This is a continuing name with changing boundaries. It is not to be construed by the agreement alone, but in conjunction with the validating Act. The city were making a contract which was to be in force for thirty years. Did not both the city and the promoters of the railway know that the limits of the city would be extended during the life of the agreement; that had been the history of the city in the past; extension from time to time of its boundaries, and therefore is it not clear that both parties had in view when the agreement was entered into, that there would be such extensions, and that the agreement was to apply to the city as it existed from time to time? The company have themselves so interpreted the agreement by extending the railway to the annexed territory in the west adjoining Toronto Junction, and in the east to Munro Park. There is no fear that any act of the city in this respect will ever work a hardship to the company, for it would be against the city's interests to do so. It is not going to order anything that would be unprofitable. In the case of *St. Louis Gas Co. v. City of St. Louis* (1870), 46 Missouri 121, the case of extended boundaries was considered, and it was held that a contract designed for a city at large operated throughout its boundaries whatever their change might be. The defendants have not been able to find any case where an agreement, such as the one here, was held not to apply to newly acquired territory. The different clauses of the agreement and the terms of the award, conditions, tender and by-law which were incorporated into the agreement, and the Act incorporating the company and confirming the agreement, 55 Vict. ch. 99 (O.), all shew that the liability contended for is imposed. Sub-sec. 4 of sec. 19 expressly shews that annexation of outside territory was contemplated. The point, however, has been expressly decided by the cases between the city and the company which have been before the Courts: *City of Toronto v. Toronto R.W. Co.*, 2 O.W.R. 226, 3 O.W.R. 204, 5 O.W.R. 130, affirmed in the Privy Council, 22, Times L.R. 32, (1906) A.C. 117, known as the mileage case, and to

special case before Anglin, J., between the same parties, reported (1904) 9 O.L.R. 333. In the former case the express point was raised as to the liability as to streets subsequently brought into the city, when the contention of the city was upheld, this Court affirming the decision of the Divisional Court. In the other case, when it came before the Court on appeal from the judgment of Anglin, J., it was admitted by the defendants that the point had been decided by this Court in the previous case, and affirmed by the Privy Council, and the judgment of Anglin, J., was therefore affirmed. The case of *The City of Montreal v. Montreal R.W. Co.*, 34 S.C.R. 472, in no way applies to annexed territory. The point was whether the city could collect percentages on streets outside the limits of the city. Then as to stops. The trial Judge properly held that clauses 39 and 26 must be read together, as the stopping of cars was necessarily part of "speed and service," and therefore the engineer had jurisdiction under clause 26 to deal with the question of stops, subject to the limitations imposed by clause 39. Then as to there being a determination by the engineer. The report of the engineer recommending was a sufficient determination, for, as the trial Judge pointed out, before there could be a recommendation there had to be a determination. This is the word always used by the railway committee under the Dominion Railway Act in their reports to the Governor-in-Council. The engineer was not acting in a judicial capacity, but as the person selected under the agreement. He is in the same position as an architect under a building contract: *Collins v. Collins* (1858), 26 Beav. 306; *Re Carus-Wilson & Greene* (1886), 18 Q.B.D. 7; Hudson on Building Contracts, 2nd ed., pp. 277-8, 531. The resolution of the council approving of the engineer's determination was sufficient. They were not acting under the powers conferred by the Municipal Act, but under the sanction and authority of the agreement: *Township of Pembroke v. Canada Central R.W. Co.*, 3 O.R. 503; *Port Arthur High School Board v. Town of Fort William*, 25 A.R. 522, 527. The plaintiffs are entitled to specific performance. The case of *The City of Kingston v. Kingston, Pembroke and Cataraqui Electric R.W. Co.*, 25 A.R. 462, does not apply. There the judg-

ment proceeded on the principle that the Courts will not grant specific performance of contracts, the execution of which would require such supervision by the Court as it would necessarily be unable to give. The principle to be adopted is that contained in that class of cases which hold that where there is some definite work to be performed, and damages are not an adequate remedy, specific performance will be decreed: *Wolverhampton v. Emmons*, [1901] 1 Q.B. 515; *Ryan v. Mutual Tontine Westminster Chambers Association*, [1893] 1 Ch. 118, 128; *London Street R.W. Co. v. City of London* (1903), 9 O.L.R. 439; *City of Hamilton v. Hamilton Street R.W. Co.* (1904), 8 O.L.R. 455; on appeal (1905), 10 O.L.R. 575, 595; *City of Hamilton v. Hamilton Street R.W. Co.*, 8 O.L.R. 642. The Act 63 Vict. ch. 102, secs. 1, 5 (O.), was expressly passed to give the Courts power to act in such cases as this.

June 29, 1906. The judgment of the Court was delivered by OSLER, J.A.:—The case involves the construction in two particulars of the agreement of the 1st September, 1891, between the plaintiffs and George W. Kiely *et al.*, set forth as a schedule to 55 Vict. ch. 99 (O.), under which the defendants are operating their railway.

The first question is whether under sec. 14 of the award, conditions, tender and by-law referred to, and incorporated in the agreement, the defendants can be required by the city to establish and lay down new lines, and extend their tracks and car service on and into territory which was not within the limits of the city at the date of this agreement, but which has since been annexed to and is now part of the city and within its enlarged and extended limits.

The question was recently before this Court on appeal from the judgment of Anglin, J., on a special case submitted in another action between the parties, but was not argued because it was conceded that it had already been practically disposed of adversely to the defendants by our decision in a still earlier action between them, reported 5 O.W.R. 130, which was afterwards affirmed by the Judicial Committee of the Privy Council. The judgment upon the special case on that point was therefore affirmed by us,

and Street, J., in holding in the present action that the defendants were bound by the agreement to extend and lay down their tracks and to operate their railway within the added or extended territory when required by the plaintiffs so to do, merely followed that decision. But inasmuch as the judgment of this Court in the special case has in this respect now been reversed by the Supreme Court, distinguishing it from the earlier decisions, it follows that the appeal from so much of the judgment of Street, J., as declares the obligation of the defendants to be what he held it to be, must be allowed, and that for the 2nd, 3rd and 4th clauses of the judgment, as drawn up, must be substituted a declaration that the defendants were not bound to comply with by-law No. 4520, passed by the plaintiffs on the 10th April, 1905, and were not bound to lay down railway tracks on Avenue road as required by that by-law, and have not committed a breach of sec. 14 of the award, conditions, tender and by-law mentioned in the second paragraph of the statement of claim, in that respect.

The other question is whether under the terms of the agreement the power to make regulations to be complied with by the defendants in respect of the places at which cars are to be stopped for the purpose of taking on or letting off passengers, rests with the defendants or with the city engineer and the council of the plaintiffs, and if with the latter, whether the regulation now sought to be enforced was made in accordance with the agreement.

The relative clauses of the award, conditions, tender and by-law on this point are as follows:

26. The speed and service necessary on each main line, part of same, or branch, is to be determined by the city engineer and approved by the city council.

37. Each car is to be in charge of a uniformed conductor, who shall clearly announce the names of cross streets as the car reaches them . . .

39. Cars shall only be stopped clear of cross streets and midway between streets where distance exceeds 600 feet . . .

For many years the defendants stopped their cars at all the places mentioned in sec. 39, but being of opinion that fewer stops

were necessary or desirable for the effective working of the railway, recently ceased to stop at many of them. Complaints having been made of the inconvenience caused by this course, the city engineer examined into the matter, and reported to the council's committee on works in favour of the restoration of nearly all the former stopping places, as follows: "I beg to recommend that the Toronto Railway Company be requested to stop their cars at the following points. List of points or places where the Toronto Railway Company shall be required to stop their cars for the purpose of taking on and letting off passengers."

The several points or places are then specified in detail. The committee sent on the report in the usual way to the board of control; the board passed it on to the council for consideration, and the latter by resolution of the 25th April adopted it without amendment.

The defendants were notified to comply with the resolution and to stop their cars as provided thereby. This they refused to do on various grounds, contending

1. That if the matter was within the jurisdiction of the engineer at all, he was acting in a judicial capacity and could not determine it without first giving notice to them and hearing their objections.

2. As expressed by Street, J., that the regulation of the places at which cars are to be stopped is not a matter coming within the 26th section, but is left to be determined by the defendants themselves, subject only to the restrictions of the 39th section. In other words, that so long as they stop at cross streets and midway between streets only when the distance exceeds 600 feet, they may stop at such points only as they deem advisable.

3. That the city engineer has not "determined," but only "recommended," that the defendants should be required to stop their cars at the points in dispute.

4. That the council have not adopted the engineer's report by by-law, but by resolution only, and that they could only act in this matter by by-law.

Some of the most serious of these objections have arisen from the singularly careless and slipshod way in which the council have

transacted business of a very important nature, but upon consideration I am of opinion that we are not compelled to yield to any of them, and that my learned brother Street's judgment should be affirmed.

Having regard to the tenor of the whole contract, it appears to me that the engineer does not occupy any judicial or quasi-judicial position between the city and the company in reference to the matters provided for by the 26th clause. The subject is one which by the very terms of the clause the former have retained under their own control, the engineer being the person agreed upon who is to advise them what in his opinion is necessary to be done by the defendants, though his determination goes for nothing until and unless the plaintiffs approve of it.

Had the question arisen at the inception of the company's operations, I think it would hardly have occurred to any one to suggest that the engineer was bound to consult with them before determining what service should be supplied. There is nothing to indicate that anything of that kind was in contemplation, and it can make no difference in the rights of the parties and the construction of the contract that what the engineer has now required to be done is something different from what the defendants had adopted. The reference of a dispute is not what is contemplated. The agreement says nothing about hearing and determining. On the contrary, the engineer is a person selected by the parties as one upon whose skill and judgment they could rely, and who from his general qualifications would be capable of determining what should be done by the defendants in this as well as in other matters, to the performance of which the defendants have obliged themselves upon the adoption by the council of his recommendation, or requisition, or determination. There is no substantial distinction between his "recommendation" in clauses 11 and 12, his "requisition" in clause 24, and his "determination" in clauses 26, 27 and 28. None of these is effective without the approval of the council, and equally, I think, none of them legally compels, though they may morally or reasonably invite, discussion or consideration between the engineer and the defendants before he refers them to

the council. To adopt the language of Hannen, J., in *Wadsworth v. Smith*, L.R. 6 Q.B. 332, 337: "The clause in question seems to me no more than an extension of the ordinary clause in building contracts that the certificate of the architect shall be conclusive as to the work done and the manner of doing it."

2. Subject to the limitation of clause 39, the regulation of the places at which cars are to be stopped seems to me to be a matter within the "speed and service" clause. Subject to such limitation, therefore, the plaintiffs had the power in the manner prescribed by the latter clause to fix such places. I refer to what was said on this point in the former case between the parties, reported 10 O.L.R. 657, 663-4 (C.A.)

3. I think that the report of the engineer to the council "recommending" that the defendants be "requested," and setting forth a list of the points and places at which "they shall be required" to stop their cars, though somewhat informally expressed, is a sufficient "determination" by him of what the defendants were to do in this respect. It was more than a mere mental determination. It was his official action, and the only official action he could take to express his determination of what the defendants should do. He might have said, "I have determined that these are the places at which stops shall be made," but it was to the plaintiffs that such determination was to be communicated by him for approval. In effect that is what he has said. He could not recommend without having first determined, and his recommendation and the language of his report shews that this is what he has done.

Nothing further was necessary except for the council to approve of the report, and when they had done so and the report and approval communicated to the defendants, as it was, it became their duty under their covenant in the agreement, to comply with what was required.

4. Then, have the plaintiffs approved of their engineer's determination? They have done so by resolution, and, though I cannot say that I am entirely free from doubt, I incline to the opinion

that this was sufficient, and that a by-law was not necessary, and that the case is not governed by secs. 325-326 of the Municipal Act. The defendants were not exercising powers under that Act. The matter was one dependent upon the contract of the parties, and where a by-law is required, as under clause 14, it is so expressed. The action of the council upon the engineer's report in other matters entrusted to his determination is elsewhere variously expressed as "approval," "confirmation," or "endorsement." The thing which becomes operative is the engineer's determination, and the approval of the council may, I think, be manifested by a resolution adopting it. The decision of this Court in *Port Arthur High School Board and Town of Fort William*, 25 A.R. 522, warrants us in so holding. And see *Lewis v. Alexander* (1905), 24 S.C.R. 551 557-558.

This case is not within the decision of the Supreme Court in *Liverpool and Milton R.W. Co. v. The Town of Liverpool*, 33 S.C.R. 180, which merely holds, upon the construction of the two statutes there in question, that a power conferred upon the town by the one to make certain regulations respecting the crossing of the railway through the town, must by force of the other be made, not by resolution, but by by-law, the terms of the latter Act impliedly excluding all power to make it otherwise when the matter to be regulated was one *by law* within the control of the council.

5. Lastly, I am of opinion that the plaintiffs are entitled to an order restraining the defendants from running the cars upon their railway except in accordance with the determination of the engineer as to the stopping places. They have covenanted to do so, and there is in the circumstances of the case no greater difficulty in enjoining them from committing a breach of their covenant than there was in the case of *Hamilton v. The Hamilton Street R.W. Co.*, 10 O.L.R. 594, recently before us. I refer to the cases there cited at p. 599, and to the case of *Wolverhampton v. Emmons*, [1901] 1 Q.B. 515, 522-3.

Appeal dismissed with costs.

NOTE.

This case forms one of a series of cases previously reported between the City of Hamilton and its Street Railway, the City of Montreal and the Montreal Street Railway, the City of London and the London Street Railway and the City of Toronto and the Toronto Railway Company. The decision already reported may be found in previous reports as follows:—*City of Hamilton v. Hamilton Street R.W. Co.*, 4 Can. Ry. Cas. 146, 153; 5 Can. Ry. Cas. 206, 223 and 38 S.C.R. 106. In the Supreme Court it was finally held that the power of the company to construct its railway was not derived wholly from its charter, but was subject to the permission of the city and, therefore, the city had a right to stipulate for the payment to it of a percentage of its gross earnings and such stipulation was *intra vires*. It was also held, following *Montreal Street R.W. Co. v. Montreal* (1906) A.C. 100, 5 Can. Ry. Cas. 287, that upon the construction of the contract such percentages should be paid not only upon traffic exclusively within the city but also upon traffic originating or terminating upon the company's lines outside the city. The decisions upon these disputes have become so numerous that space does not permit of the publication of this judgment of the Supreme Court nor of the other judgments about to be mentioned. The cases between the Montreal Street Railway and the City of Montreal are to be found in 4 Can. Ry. Cas. 114 and 5 Can. Ry. Cas. 287, and the London Street Railway case is 4 Can. Ry. Cas. 171. Of the cases between the Toronto Railway Company and the City of Toronto reference may be made to 4 Can. Ry. Cas. 159 and 5 Can. Ry. Cas. 234, 239, 250 and 278. The case now reported is an appeal from the judgment of Mr. Justice Street, 5 Can. Ry. Cas. 278. Besides the decisions appearing in these reports there are also questions raised as to the company's liability for track rentals mentioned in the decision now reported. The judgments on this point appear in 2 O.W.R. 225, 3 O.W.R. 204, 5 O.W.R. 130 and (1906) A.C. 117. In *Toronto R.W. Co. v. City of Toronto*, 13 O.L.R. 532, it was laid down that while the city could not expropriate for a park, land of a railway company devoted to a public or quasi-public use yet where lands owned by a company whose business constitutes a public use are not in actual occupation or are not essential to the undertaking they stand on the same footing as those of a private owner and may

be expropriated. See also on this point *Re Bronson and City of Ottawa*, 1 O.R. 414; *Cincinnati, etc., R.W. Co. v. Belle River*, 48 Ohio St. R. 273; *Youghioghaney Bridge Co. v. Pittsburgh*, 201 Penn. St. 457. Much of this litigation has been brought to a close by a decision of the Privy Council reported (1907) A.C. 315, on appeal from the judgment of the Supreme Court, 37 S.C.R. 430, 5 Can. Ry. Cas. 250. The judgment of the Board was delivered by Lord Collins on April 26th, 1907, and reverses the previous decisions of the Canadian courts holding that under its agreement with the city ratified by Statute 55 Vict. ch. 99 (Ont.) the railway company acquired not merely the material of the railway undertaking in suit but also, as was clearly provided, the exclusive right to "operate surface street railways in the city of Toronto" in the fullest possible way. It was further held, that territorial additions made to the city during the term of the agreement were not within its scope, that where the company failed to comply with the city's demand to lay new tracks on other streets, the sole remedy was a right to grant a franchise on those streets to some other purchaser and a claim for damages was not maintainable, that the exclusive right to determine the route and stopping of the different cars and their inter-relations was vested in the company, and that while in particular, clause 26 of the contract gave the city power to determine the speed and service necessary on each main line, yet that clause, being included amongst sections headed "tracks, etc., and roadways," all referring to the physical condition of those entities, and not to the course or direction of the cars, it should not be construed as intended to derogate from the company's exclusive powers. It will be seen that this decision is a somewhat sweeping reversal of the judgments of the Canadian courts, and in so far as the decision now reported deals with the right to fix stopping places and the powers to be exercised by the city engineer the latter may be taken to be overruled.

ARBITRATION—APPEAL—COMPENSATION.

ONTARIO]

[RIDDELL, J.

IN RE CAVANAGH AND CANADA ATLANTIC RAILWAY COMPANY.

(14 O.L.R. 523).

Railways—Expropriation of Land—Award—Appeal From—Barrister—Arbitrator—Affidavit By—Examination on Motion—Evidence of Arbitration—Hotel Property—Adjacent to Railway—Right of Company to Fence Off Railway Premises—Effect of—Goodwill—License, Value of—Interest.

There is no objection to an arbitrator who is a barrister and probably also a solicitor making an affidavit shewing how the amount found by the arbitrators was made up for use on an appeal from an award under the Dominion Railway Act, 1903—137; and it is therefore properly receivable on such appeal, as is also the evidence of an arbitrator given on his examination as a witness on a pending motion.

Where the land taken consisted of an hotel property, an allowance was properly made for the loss sustained by the owner for the disturbance of his business and anticipated profits by reason of the expropriation, notwithstanding by the fencing off of the railway property therefrom, which the company had the right to do, the hotel property might have been rendered valueless as such, but which right the company had never attempted to exercise and presumably never would have exercised.

The value of the license of an hotel is also a proper subject of allowance, though merely a personal right, and the renewal thereof, though reasonably probable, is not absolutely certain.

Interest on the amount of compensation awarded is properly allowable from the date of the taking of the land, which in this case was the filing of the plan shewing the land expropriated, and the order of the Railway Commission authorizing the taking.

THIS was an appeal by the railway company, and a cross-appeal by the land owner, from an award of compensation for lands taken by the railway company under the Dominion Railway Act, 1903.

The appeal was heard before Riddell, J., sitting in the Weekly Court, at Toronto, on April 20, 1907.

M. K. Cowan, K.C., for Canada Atlantic R.W. Co.

M. J. Gorman, K.C., for the owner.

April 27, 1907. RIDDELL, J.:—James Cavanagh is the owner of a trapezoidal piece of land in Ottawa, bounded by Besser and Little Sussex streets, Currier lane, and the property of the Canada Atlantic

R.W. Co. The railway company, requiring this property, filed a plan on the 18th May, 1906, shewing that they required the land. Before doing this the railway had on March 20th, 1906, obtained an order of the Board of Railway Commissioners, under sec. 139 of the Railway Act, 1903, authorizing them to take and acquire the said land, which order was deposited in the proper registry office at Ottawa with the plan, on the 18th May, 1906. The deposit of the order was advertised in the Ottawa Free Press upon the same day. The parties not agreeing as to the price to be paid, arbitrators were chosen under the provisions of the Railway Act, the company selecting John Christie, Esq.; the owner, the Hon. F. R. Latchford, K.C.; and John C. Featherstone, Esq., was selected as the third arbitrator, all these gentlemen being residents of Ottawa, and of the highest possible standing, Messrs. Christie and Latchford being prominent members of the Bar of that city, while Mr. Featherstone is the local registrar of the High Court of Justice there.

A very considerable body of evidence was taken, and, finally, on the 5th day of March, 1907, two of the arbitrators, Messrs. Latchford and Featherstone, signed and published an award whereby the owner was allowed "the sum of twenty-two thousand dollars as a proper compensation to the said James Cavanagh for the said land and for all damage by him sustained arising from the taking of the same by the Canada Atlantic R.W. Co., or by the exercise of any of the powers granted to the said company by the said Act": see R.S.C. 1906, ch. 37. Thereupon both parties appealed under R.S.C. 1906, ch. 37, sec. 209, and the appeals were argued before me in Court.

The first step taken by the railway company, even before serving notice of appeal, was to procure an affidavit from Mr. Christie showing how the \$22,000 was made up. Objection was taken to this affidavit being read before me upon the ground that Mr. Christie is a barrister, and Russell on Awards, 9th ed., at pp. 305 and 306, was referred to. No doubt, members of the Bar should avoid making affidavits in matters in which they have been engaged professionally, and there is a well-understood rule amongst

the profession in that sense; but I do not find that even in England the rule is always insisted upon where the barrister is an arbitrator. And in Ontario, where the barrister is generally also a solicitor, the objection could not prevail. The solicitor is the most prolific source of affidavit evidence; and I do not know that a barrister who is also a solicitor need fear, when he is swearing in his capacity of solicitor, the evil fate threatened the mediæval bishop who swore in his capacity of prince.

I do not give effect to the objection.

Then, after service of notice of motion, Mr. Featherstone was examined before a special examiner as a witness on the motion then pending. Mr. Featherstone answered without hesitation, and seemed anxious to give the fullest information as to the grounds for the award.

Objection was taken before me, also, to the reading of this evidence. Following a decision of Meredith, J., in *Ogilvie v. Montreal and Ottawa R.W. Co.* (1898), (not reported on this point, though reported on a question of practice in 18 P.R. 120, in which I was counsel for the railway company, and had examined two of the arbitrators—both barristers, by the way—in the same way Mr. Featherstone was examined here), I overrule the objection. In that case Meredith, J., held, upon objection being taken by Osler, Q.C., upon the principle that arbitrators could not be compelled to state the grounds of their judgment, that, however that might be, yet if arbitrators did state their grounds, there was no reason why such evidence should not be received. This was not a mere academic ruling, but the admission of the evidence resulted in a substantial reduction of the award.

Upon the argument of the appeal, I allowed to be read this evidence, the affidavit of Mr. Christie and the evidence before the arbitrators.

It will be noticed that the statute R.S.C. 1906, ch. 37, sec. 209, which governs this appeal, provides that: "Upon the hearing of the appeal the court shall, decide any question of fact upon the evidence taken before the arbitrators, as in a case of original juris-

diction." Upon all questions of fact, therefore, I look only at the evidence before the arbitrators; while the meaning of the expression "as in a case of original jurisdiction" has been interpreted by the court of final resort.

In *Atlantic and North-West R.W. Co. v. Wood*, [1895] A.C. 257, the Judicial Committee were called upon to interpret the same expression in the former Railway Act, 51 Vic., ch. 29, sec. 161 (2) (D.); and they say, at p. 263: "It would be a strained and unreasonable reading of the words of the statute, 'as in a case of original jurisdiction,' to hold that the evidence was to be taken up and considered as if it had been adduced before the Court itself in the first instance and not before the arbitrators, and entirely to disregard the judgment of the arbitrators and the reasoning in support of it. Such a reading of the statute would really make the Court the arbitrators, and the sole arbitrators in every arbitration in which an appeal on questions of fact was brought against an arbitrator's award. It appears to their Lordships that this was not the intention of the legislature, and that what was intended by the statute was not that the Court should thus entirely supersede and take the place of the arbitrators, but that they should examine into the justice of the award given by them on its merits, on the facts as well as the law." I am the more glad in this instance that the rule has been thus laid down, as I am thereby enabled to avail myself to the full of the local knowledge of the arbitrators.

The rule to be followed by an appellate tribunal in "a case of original jurisdiction" is laid down in *Coghlan v. Cumberland*, [1898] 1 Ch. 704, at pp. 704-705. "Where, . . . , the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the Court must reconsider the materials before the judge with such other materials as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the Court comes to the conclusion that the judgment is wrong."

With these principles so authoritatively laid down, I approach the consideration of the evidence.

The property in question was used by Cavanagh as a hotel, and it is fairly clear from the evidence that the hotel depended for its success upon the bar; that the bar was very profitable, but solely so because of its proximity to the station of the railway company rendering it easy for patrons of the railway to go into the hotel for refreshments, either passing to or from the station or when waiting at the station. Admittedly, the railway company might lawfully close out all access to and from their grounds, so as to deprive the owner of this very lucrative custom. It appears from the affidavit of Mr. Christie and the examination of Mr. Featherstone that the two arbitrators who signed the award, or at least Mr. Featherstone, gave the \$22,000 on the following basis:

For the land.....	\$ 9,000
For the building.....	8,000
And for removal, loss, including goodwill and inconvenience and other damages sustained.....	5,000
<hr/>	
In all.....	\$22,000

I avail myself, as was done in *Ogilvie v. Montreal and Ottawa R.W. Co.*, of this evidence to see the principle upon the which arbitrators proceeded upon the argument. Counsel for the company attacked each and all of these amounts, but especially the \$5,000. I have read all the evidence adduced by both parties, and think that the sums awarded for the land and for the buildings are not excessive. It is true that a great deal of evidence was given shewing that land in the immediate vicinity was much of it bought at a considerably smaller figure, and that some was unproductive property; but, taking the evidence as a whole, I am satisfied that the two arbitrators have arrived at a fair estimate. And it must not be forgotten that full recompense should be made to the owner in proceedings of this character. Taking the land (4,365 square feet), the witnesses for the company place this at these sums:—

Donald	\$ 5,000
Wallace	6,000
Cole.....	6,000
Macfarlane	7,000
	<hr/>
	\$24,000

An average of..... \$6,000

Witnesses for the owner place the amount very much higher, the owner himself as high as \$13,500, and others \$12,000, and smaller sums down to \$10,000. I do not think \$9,000 is too much, even taking into consideration the argument of Mr. Cowan, of which I shall speak later on.

Then, as regards the building, the company's witnesses say:—

Donald	\$ 6,000
Wallace	7,500
Cole.....	8,000
Macfarlane	8,000
	<hr/>
	\$29,500

An average of \$7,375

Witnesses for the owner place this all the way from \$8,000 to \$10,000; and I think \$8,000 is not an extreme figure.

The third item of damage is, perhaps, not so easy to estimate.

It was argued for the railway company upon this branch chiefly, though also upon the other branches, that all the trade (in effect) of value to the premises, all that made the premises valuable, was due to the proximity of the railway company's station, and the convenience of access to and from the station. I think that that is true to a very great extent indeed. Then it is argued that the railway company might lawfully fence off the hotel premises

and the street running by, and so deprive the hotel of practically all its valuable custom; and this without rendering the company liable for damages. This is, I think, also true. Then it is said, since the railway company could, if it pleased, render the property valueless, at least as a hotel, nothing should be allowed against the railway company when, instead of doing so, it is taking away the land itself. And the case is relied upon of *Caledonian R.W. Co. v. Walkers' Trustees* (1882), 7 App. Cas. (H.L.Sc.) 259. There it was held that no compensation is given for damages if the thing done was one for which, if done without any statutory authority, no action could have been maintained. And that case would be authority (if any were needed) for the proposition that if the company were to fence off the hotel property, no compensation could be awarded. But that is not what is being done—the company is taking away from the owner property to which they have no right without the assistance of the statute. And while, no doubt, they might destroy in large measure the value of the property, at least as a hotel, without any right of action, no one in his senses would expect them to do anything of the kind in the usual course of business. Under all the circumstances of this case, I think it is reasonable to believe—and I do believe—that unless and until the company should want to acquire this property, no interference was to be anticipated, though such interference was within the right of the company. Railway companies are no more likely than natural persons, metaphorically speaking, “to bite off their nose to spite their face.” It might, indeed, well be that a company might threaten so to act, or in reality so act, with a view to compelling a sale of the property at a low valuation; but I do not see that, except with this in view, anything of the kind was ever to be anticipated. The arbitrators, then, were right in allowing a sum for the disturbance of business and loss of profit reasonably to be anticipated.

Then it is argued that the business could not be a success without a liquor license; that there was no certainty of the renewal of the liquor license, and, in any case, such renewal is a personal right, and, therefore, nothing should be allowed for the loss of a

business which depends upon such a chance. For this is cited the case of *Lynch v. City of Glasgow* (1903), 5 Ct. Sess. Ca. 5th Series, 1174. In that case the pursuer was tenant of certain licensed premises under a lease for years, and it was held that the Corporation expropriating this land was not liable to pay the pursuer any sum for the chance of obtaining a renewal of her lease. This was under a statute which provides that the amount to be paid is fixed thus: "The estimate of the value of such lands or interests shall be based upon the fair market value, as estimated at the time of the valuation being made, of such lands and of the several interests in such lands, due regard being had to the nature and the condition of the property": p. 1178.

The oversman had allowed a sum for the interest of the business "in the said lease, goodwill and right of renewal," and the Lord Ordinary held that he had a right to do so, as he considered that the terms of the nomination of the arbitrators went considerably beyond anything contained in the Act. This, in appeal, was reversed, and it was held that the arbitration was on the terms mentioned in the Act, and, therefore, the oversman had gone beyond his power. It is not questioned that if the reference had been so general as the Lord Ordinary considered, the award might well stand.

Our statute is much more general than the Act under which the expropriation took place in the *Lynch* case, and I think is quite broad enough to entitle the owner here to a reasonable sum taking into account the chances of a renewal of his liquor license. It is common knowledge that, if a license holder conduct himself properly, he need have little fear that his license will not be renewed. A liquor license, too, is not a mere personal right—the license is attached to the property quite as much as to the person, if not more so.

The case of *Ex parte Farlow* (1831), 2 B. & Ad. 341, is a case in which, under a different wording, the tenant was held entitled to damages, although he was a mere tenant from year to year, it appearing that there was no likelihood of the tenancy being determined had the Act not been passed authorizing the Hungerford

Market Company to take the land. This tenant was allowed damages for the whole marketable interest he had in the land; and it was held that the goodwill, though of premises on so uncertain a tenure, was an interest practically of value, though not a legal interest as against the landlord.

I am of opinion that the probability of the owner of the hotel losing a license, while it should be taken into account in fixing the value of the goodwill and damages for being ousted from the premises is, after all, but a small one. I think that the sum allowed by the arbitrators—viz., \$5,000—is not too large.

The appeal, then, of the company must be dismissed with costs.

The owner cross-appeals, claiming an increase of the award, and also interest from the date of filing the plan.

While much of the evidence would warrant an increase in the amount awarded, I do not, taking all the evidence together, think it proper to increase the award.

As to interest, the value of the land, etc., was fixed with reference to the date of filing the plan, and rightly so in this case. The order of the Board being deposited, it was practically impossible for the owner to do anything with his land except hold it for the company. *James v. Ontario and Quebec R.W. Co.* (1886), 12 O.R. 624, decides that interest is properly allowed to the landowner on the amount of his compensation from the time of taking—i.e., I think, from the time the landowner knew that he had to give up his land—to the time of the award. It was urged that the railway company was not chargeable with interest at all. It seems to me a monstrous proposition to say that a railway company may tie up a man's land, prevent him from obtaining any advantage from a rise in value, have the land valued at their leisure months afterwards, and then get off with the principal. I find no authority so deciding, and I shall make none. I follow the *James* case as to the interest being allowed from the time I have mentioned. But it is said that the case also decides that "interest is not recoverable for the period when the company could not lawfully have had possession"—see 12 O.R., at p. 631—that the company could not lawfully have had possession

because they were not ready to proceed with the work for which this property was needed; that they applied to the Judge of the county court of the county of Carleton for an order for possession, and this application was refused, the owner opposing the granting of such an order. This makes the case, if possible, more clear against the company. Instead of waiting until they really wanted and were ready to utilize the property, they get an order from the Board for the land, and deposit this order in the registry office, thereby tying up the property. They do not hasten their preparations for the work, but, without being ready to proceed, try to obtain possession without paying the full value of the property, and then, upon failing in this, proceed at their leisure to have the price fixed. This is not a case in which the "company could not lawfully have had possession"—it is a case of the company obtaining an order for the land before they really were ready for and needed it. The appeal of the owner will be allowed to the extent of allowing interest upon the compensation from the date of filing the order; otherwise it will be dismissed.

I cannot help but think that the substance of the appeal of the owner was really the interest claimed, and the appeal, so far as it related to the amount of the award, is a mere make-weight. The owner will have the costs of his appeal, except so far as the same have been increased by the appeal on the question of amount of award. He will pay to the company the amount, if any, by which their costs are increased by the appeal as to quantum.

On the question of interest, the following may be looked at: *Re Birely and Toronto, Hamilton and Buffalo R.W. Co.* (1897), 28 O.R. 468, S.C. (1898), 25 A.R. 88; *Re Leak and City of Toronto* (1899), 26 A.R. 351, S.C. (1900), 30 S.C.R. 321; *Re Macpherson and City of Toronto* (1895), 26 O.R. 558, 567.

NOTES.

CONDUCT OF ARBITRATORS—APPEAL—EVIDENCE.

These matters have been recently discussed in *Wicher v. Canadian Pacific R.W. Co.*, ante p. 181; *Morley v. Klondike Mines R.W. Co.*, ante page 83; *Harrigan v. Klondike Mines*

R.W. Co., ante page 193 and notes page 194; *Re Armstrong and James Bay R.W. Co.*, 5 Can. Ry. Cas. 306; *James Bay R.W. Co.*, v. *Armstrong*, ante. page 196 and notes page 199, and *Day v. Klondike Mines R.W. Co.*, ante page 203 and notes page 217. In *James Bay R.W. Co. v. Armstrong* leave was granted in July last (1907) to appeal from the decision of the Supreme Court. This appeal now stands for argument.

Loss of Profits and Injury to Business. In "*The Burnt District Case*," 4 Can. Ry. Cas. 290, the question of the right of owners of land to claim for "business losses" suffered under the circumstances there set out was discussed and an order declaring the Grand Trunk R.W. Co. liable for such losses to owners whose lands it proposed to expropriate was, under the circumstances, refused. At the same time there are instances where loss of profits and injury to business have been allowed as part of the compensation due to land owners whose property has been taken. In *Metropolitan Board of Works v. McCarthy*, L.R. 7 H.L. 243, the leading case upon the subject, it is laid down:

(a) That to entitle an owner to compensation there must be an injury and damage, not temporary but permanent peculiarly affecting the house or land itself.

(b) That a mere personal inconvenience, obstruction or damage to a man's trade or the goodwill of his premises will not be sufficient, although but for the statute authorizing the expropriation any one of them might have been the subject of an action against the person doing the injury.

(c) But where by reason of the work access is destroyed to premises in the neighbourhood which were previously peculiarly fitted for a particular kind of business and this peculiar fitness is thereby lost or diminished the owner of such premises is entitled to compensation for the losses which his business thereby suffers.

(d) To this last proposition there is the qualification that where no part of the premises injured is destroyed and access remains the premises are not "injuriously affected" within the meaning of the statutes and no compensation for "business losses" or otherwise is allowed: *Ricket v. Metropolitan R.W. Co.*, L.R. 2 H.L. 175, followed and applied; *McPherson v. The Queen*, 1 Ex. C.R. 53; *Lefebvre v. The Queen*,

ib. 121; *Paradis v. The Queen*, 1 Ex. C.R. 191; *Powell v. Toronto, Hamilton & Buffalo R.W. Co.*, 24 A.R. 209. For a recent illustration of this rule see *The King v. Mountford* (1906), 2 K.B. 814, where a dentist who claimed damages to his business because car tracks were moved nearer to his premises and thereby his patients were disturbed had his claim refused. Had the injury to the claimant's trade in the *Cavanagh Case* now reported been temporary and not permanent, the case of *Ricket v. Metropolitan R.W. Co.* would appear to be authority for the proposition that no compensation would be allowed.

What constitutes an interest in land.

(a). *Goodwill.* In *Ricket v. Metropolitan R.W. Co.*, L.R. 2 H.L. 175, Lord Westbury in his dissenting judgment at page 205 says that "The trade or custom is a thing appertaining to the premises and not to the person of the occupier; but all things appertaining to the premises are part of the premises and included in the interest of the occupier; which word 'interest' is a large and comprehensive word. I adopt the observation of the Court of Exchequer: 'Loss of profits by loss of business is a loss to the goodwill of the premises and the goodwill is part of the value of the property.'" This being a dissenting judgment the remark cannot of itself be accepted as authoritative but in the earlier case of *Cameron v. Charing Cross R.W. Co.*, 16 C.B.N.S. 430, that great Judge, Mr. Justice Willes, says at page 447 that "Damage to a man's interest in land necessarily includes damage to the business which he carries on upon the land by diverting it from its accustomed channel. Such an interest is not merely personal: it is an interest which a man enjoys in respect of the land,—a reasonable expectation of profit from the exercise of his abilities in some particular place by carrying on business there. That reasonable expectation of profit is commonly called 'goodwill' and is a marketable thing." This case has been remarked upon in the judgments in *Ricket's Case* in the House of Lords; but in two recent textbooks of high authority, Cripps on Compensation, 4th ed. p. 99, and Browne & Allan, on Compensation, 2nd ed., p. 101, the right to compensation for loss of goodwill is recognized. See also *The King v. Shires*, 9 Ex. C.R. 200; and

Paint v. The Queen, 2 Ex. C.R. 149; 18 S.C.R. 718. The remarks in *Cripps* on Compensation on this point may well be quoted. They are as follows:—

“A further item to be taken into consideration is the probable diminution in the value of the claimant’s goodwill in his trade consequent on the taking of the premises in which such trade is carried on.

Goodwill is the probability of the continuance of a business connection, and its value is fixed at a certain number of years’ purchase according to the nature of the particular trade or business.

So far from the goodwill being purchased or destroyed by the promoters, there are many cases in which the diminution in its value is hardly appreciable although the trade premises have compulsorily been taken.

If a business is of a wholesale character or is one which consists of orders from a widely-extended area, a compulsory change of trade premises would be productive of small loss. If, in addition, convenient premises can be acquired in the immediate neighbourhood of the premises taken, the loss incurred through diminution in the value of goodwill becomes merely nominal, and the owner’s only claim to compensation is in respect of any reasonable expenses which the taking of equally convenient new premises had rendered necessary: *Re Bidder v. West Staffordshire* (1879), 4 Q.B.D. 432.

On the other hand, there are cases in which the diminution in the value of a goodwill may almost equal the entire value of a goodwill.

This is the case where a business is retail and local, depending on neighbouring customers, and no suitable premises can be found in the locality within which the business connection extends: *White v. Commissioners of Public Works* (1870), 22 L.T. 591.”

Interest in Lease. The fact that a lease is to terminate at a fixed date and that no absolute right of renewal is reserved is in Scotland sufficient to deprive the owner of compensation for the bare prospect that the landlord will continue the claimant as his tenant after the expiration of the existing term: *Lynch v. Glasgow*, 5 F. (Ct. of Sess. Cas.) 1174; but where the lease

confers even an indefinite right of renewal such right has been considered as a proper subject of compensation in England: *Ex parte Farlow*, 2 B. & Ad. 341, and it will be noticed that Mr. Justice Riddell considered that our statute conferred greater rights upon a tenant and that the prospect of continuing upon the premises was an interest sufficient to entitle him to compensation. In *McGoldrick v. The King*, 8 Ex. C.R. 169, the right of a tenant under a lease which had expired and was never renewed was looked upon as a right for which compensation should be allowed. Whether the Canadian Acts really confer a greater right to compensation than the Scottish Acts do, as is stated by Mr. Justice Riddell in *Cavanagh's* case now reported, is a question which (it is submitted with great respect) is open to some consideration. The English and Scottish Acts are substantially the same, and while Chief Justice Armour in *Re Birely and Toronto, Hamilton & Buffalo R.W. Co.*, 28 O.R. 468, considered that the Canadian Act gave some wider rights to compensation than the Imperial Act, the Court of Appeal in *Powell v. Toronto, Hamilton & Buffalo R.W. Co.*, 25 A.R. 209, expressly accepted the decisions under the Imperial Acts and the *Birely Case* was not followed. In *Paradis v. The Queen*, 1 Ex. C.R. 191, a case under the statutes giving the Crown a right to expropriate, the English decisions were also expressly followed. The point in these last cases though not precisely the same is sufficiently allied, to justify the enquiry whether *Lynch v. Glasgow* would not in a similar case be treated as binding under our statute. Where there is no leasehold interest in the land but a mere license to occupy part of the premises (in this case a theatre) as a cloak-room and refreshment room used in connection with the theatre such occupation does not create an interest in land for which any right to compensation exists: *Warr v. London County Council* (1904), 1 K.B. 713.

Liquor Licenses. The subject of goodwill and of a tenant's interest in a lease is closely allied to the right to compensation for the taking of premises where liquor is sold and the cases of *Lynch v. Glasgow*, 5 F. (Ct. of Sess. Cas.) 1174; *Ricket v. Metropolitan Board of Works*, L.R. 2 H.L. 175, *supra*, may be consulted; see also *Re London County Council and City of London Brewery Co.* (1898), 1 Q.B. 387. The nature of a liquor license was considered in *Walsh v. Walper*, 3 O.L.R. 158, where in a case under the Execution Act it was held that a

liquor license was a merely personal right and one not capable of seizure under execution, and a covenant by a lessee to apply from time to time for a license and at the expiration of the lease to assign the license to the lessor is merely personal and has nothing to do with the land or its tenure. Some idea of the nature of a terminable license may be gathered from a consideration of the cases of *Smylie v. The Queen*, 27 A.R. 172, and *In re J. D. Shier Lumber Co.*, 14 O.L.R. 210, where the nature of a timber license which is itself terminable and held more or less at the will of the Crown is considered.

Since writing the above there have appeared reports of *The King v. Rogers*, 43 Can. L.J., p. 623, and *The King v. Stairs*, *ib.* p. 624; as these cases bear upon the subject now under consideration the notes appearing in the *Canada Law Journal* are reproduced.

Burbidge, J.]

THE KING v. ROGERS.

[April 22.

Expropriation—Licensed hotel—Special value of premises to owner arising from liquor license—Compensation.

The Crown expropriated for the purposes of a public work certain premises which the owner used as a hotel licensed to sell liquors. The license was an annual one, but, as the license laws then stood, it could be renewed in favour of the then owner, or in case of his death, of his widow; but no license could be granted to any other person for such premises. If the owner sold the property it was shewn that the use to which he put it could not be continued.

Held, that while this particular use of the property added nothing to its market or selling value, it enhanced its value to the owner at the time of the expropriation and that such was an element to be considered in determining the amount of compensation to be paid to him for the premises taken.

MacIlreith and *Tremaine*, for plaintiff. *W. B. A. Ritchie*, and *Tobin*, for defendants.

Burbidge, J.]

THE KING v. STAIRS.

[April 22.

Expropriation — Claim for damages for business — Claim for depreciation of value of machinery — Compensation.

Where the whole property is taken and there is no severance the owner is entitled to compensation for the land and property taken, and for such damages as may properly be included in the value of such land and property. He is not entitled to damages because such taking injuriously affects a business which he carried on at some other place.

Defendants, in expropriation proceedings, at the time their premises were taken had them fitted up as a boiler and machine shop. The machinery was treated as personal property by the defendants, and sold for less than it was worth to them when used for such purposes.

Held, that they were entitled to compensation for the depreciation in value of the machinery by reason of the taking of the premises where it had been used.

MacIlreith and *Tremaine*, for plaintiff. *Bell*, for defendant.

NEGLIGENCE—CONDITION—NOTICE OF CLAIM.

MANITOBA.]

[RICHARDS, J., MATHERS, J.

HAYWARD V. CANADIAN NORTHERN R.W. CO.

(16 *Man. L.R.* 158).

Railway company—Negligence—Condition requiring notice of claim for damage to goods—Railway Act, 1903, sec. 214, sub-sec. 3, sec. 275.

A condition in a shipping bill providing that there should be no claim for damages to goods shipped over a railway unless notice in writing and the particulars of the claim are given within thirty-six hours after delivery, if it has been approved by order or regulation of the Board of Railway Commissioners for Canada, under sec. 275 of the Railway Act, 1903, is binding upon the shipper, even if negligence on the part of the railway company is proved, notwithstanding the language of sub-sec. 3 of sec. 214 of the Act, enacting that "subject to the Act" the company shall not be relieved from an action by any notice, condition or declaration, if the damage arises from any negligence or omission of the company or of its servants, as both sections of the Act must be read together. *Grand Trunk R.W. Co. v. McMillan* (1889), 16 S.C.R. 543 and *Mason v. Grand Trunk R.W. Co.* (1873), 37 U.C.R. 163, followed.

Appeal by plaintiff from a verdict entered in favour of the defendants by the junior County Court Judge of Winnipeg.

Plaintiff shipped a quantity of household furniture over the defendants' railway from Winnipeg to Watson in the Province of Saskatchewan. When the goods arrived at Watson they were found to be damaged, and this action was brought to recover the amount of the damage, on the ground that it was caused by the defendants' negligence.

ARGUED: May 18, 1906.

DECIDED: June 25, 1906.

T. Mayne Daly, K.C., for plaintiff, appellant. The goods were shipped on the 1st August. They arrived at Watson Station on the 7th August, and were delivered from the car on the 8th August.

The plaintiff contends that there is no evidence to bear out the Judge's finding that the goods were not properly packed; on the

contrary the evidence of the plaintiff shews that they were well packed and in good order. The company should not have received them if they were not in good order and properly packed. See cases cited at page 391.

MacMurchy and Denison's Canadian Railway Act (Annotated).

The damage arose from storing the goods in a car with iron rails. Putting rails in with furniture is evidence of negligence.

As to Clause 12 of the shipping bill not having been complied with, the defendants cannot contract themselves out of the result of negligence. See sec. 214 of the Railway Act of 1903.

The defendants did not furnish suitable accommodation, and did not carry the goods with care and diligence. The freight was prepaid. Sub-sec. 3 of sec. 214 gives right of action in the absence of notice where damage arises from negligence. *Grand Trunk R.W. Co. v. Vogel*, 11 S.C.R. 612. The defendants relied on *Robertson v. Grand Trunk R.W. Co.*, 24 S.C.R. 611. That case was distinguishable. *Vogel v. Grand Trunk R.W. Co.*, is still good law. *St. Mary's Creamery v. Grand Trunk R.W. Co.*, 8 O.L.R. 1; *Ferris v. Canadian Northern R.W. Co.*, 15 Man. L.R. 134; MacMurchy and Denison's Canadian Railway Act, (Annotated), p. 404. Sec. 214 of the Act requires adequate accommodation. *Rathbone v. MacIver* (1903), 2 K.B. 378; *Burdett v. Canadian Northern R.W. Co.*, 10 Man. L.R. 5. As to negligence, *Czech v. General Steam Navigation Co.*, L.R. 3 C.P. 14; *Regina v. Grenier*, 30 S.C.R. 42; *Mitchell v. Lancashire & Yorkshire R.W. Co.*, L.R. 10 Q.B. 256.

D. H. Laird, for defendants, respondents. The damaged goods were a mirror, crockery, furniture and kitchen utensils. There is no evidence that they were properly packed, and the shipper's agent by the release acknowledged they were not.

The learned trial judge so found, and his judgment is on the basis that the damage was due to insufficient packing. "Inherent vice" in goods is a valid defence at common law for carriers and this includes insufficient packing. Abbott on Railway Law, p.

296; MacMurchy and Denison's Canadian Railway Act, p. 391; Stroud, vol. 3, p. 2187; *Goodman v. Oregon*, 28 Pac. Rep. 894-898. The statute does not deprive the defendants of this defence. MacMurchy and Denison's Canadian Railway Act (Annotated), p. 405; *Kendall v. London and South Western R.W. Co.*, 7 Ex. 373.

Condition 2 of the bill of lading exempts the company from liability for injury to furniture, and condition 4 of injury to packages liable to breakage. These are, beyond question, valid until negligence is shewn.

The words "subject to this Act," contained in sub-sec. 3 of sec. 214 of the Railway Act, 1903, are new, and refer to sec. 275. These conditions have been approved by the Board, and even had negligence been shewn defendants are not liable. Condition 12 requires notice of claim. This is a good defence under the former Railway Act. *Grand Trunk R.W. Co. v. McMillan*, 16 S.C.R. 559. *Mason v. Grand Trunk R.W. Co.*, 37 U.C.R. 163. This also was approved by the Board.

RICHARDS, J.:—The plaintiff, by her agent, delivered to defendants furniture to be forwarded to Watson, a station on defendants' line, and there delivered to plaintiff.

The shipping bill, signed by plaintiff's agent, stated that the contract was subject to conditions, one of which reads:

"There shall be no claim for . . . damage to any goods for which the company is responsible unless and until notice in writing and the particulars of the claim of said damage . . . are given to the station freight agent at or nearest to the place of delivery within thirty-six hours after the goods in respect of which said claim is made . . . are delivered."

The goods were delivered at Watson to plaintiff. No notice within the above condition (12), was given.

Plaintiff sued defendants in the County Court of Winnipeg, for injuries done to the goods while in transit, and stated to have been caused by defendants' negligence.

At the trial defendants set up the absence of notice under

condition 12. The learned trial Judge nonsuited plaintiff, who then appealed to this Court.

Plaintiff's contention is, that sec. 214(3) of the Railway Act, 1903, makes the above mentioned 12th condition invalid.

Section 214 requires the railway to carry and deliver with due care all traffic offered for carriage upon it, and then says in sub-sec. (3) "Every person aggrieved by any neglect or refusal in the premises shall, subject to this Act, have an action therefor against the company, from which action the company shall not be relieved by any notice, condition or declaration, if the damage arises from any negligence or omission of the company or of its servant."

Is condition 12 of the shipping bill prevented by the above sub-sec. (3) from relieving defendants in the present case?

The words "subject to this Act" in that sub-section shew that it is to be read with the other provisions of the Act.

Section 275 of the Act says: "No . . . condition . . . made by the company impairing, restricting or limiting its liability in respect of the carriage of any traffic shall relieve the company from such liability, . . . unless such class of . . . condition . . . shall have been first authorized or approved by order or regulation of the Board," meaning by "Board" the Board of Railway Commissioners for Canada.

The above section clearly implies that such conditions as are referred to in it, shall relieve the company from liability when approved of by the Board and made part of the contract with shippers of goods. As secs. 214 and 275 must be read together sub-sec. (3) of sec. 214 should be read, I think, as if it contained after the words "notice, condition, or declaration," the words "not authorized or approved of by order or regulation of the Board as contemplated by sec. 275 of this Act."

The Board have, admittedly, approved of the use of condition 12 in the defendants' shipping bill. It seems to me, therefore, that that condition was binding on plaintiff, and that the omission to give the notice as required by it, is fatal to plaintiff's right to recover in this action.

I would affirm the nonsuit, and dismiss the appeal with costs.

MATHERS, J.:—By sec. 214, sub-sec. 3, of the Railway Act, 1903, "Every person aggrieved by any neglect or refusal in the premises shall, subject to this Act, have an action therefor against the company, from which action the company shall not be relieved by any notice, condition or declaration, if the damage arises from any negligence or omission of the company or of its servant."

Section 275, sub-sec. 1, of the same Act provides that "No contract, condition, by-law, regulation, declaration or notice made or given by the company impairing, restricting or limiting its liability in respect of the carriage of any traffic shall relieve the company from such liability, except as hereinafter provided, unless such class of contract, condition, by-law, regulation, declaration or notice, shall have been first authorized or approved by order or regulation of the Board."

Clause 12 of the conditions indorsed upon the shipping bill in this case is:

"12. There shall be no claim for damage for loss of or detention of or injury or damage to any goods for which the company is accountable unless and until notice in writing and the particulars of the claim of said loss damage or detention are given to the station freight agent at or nearest to the place of delivery within thirty-six hours after the goods in respect of which said claim is made or such portions of them as are not lost are delivered."

On 17th October, 1904, the Board of Railway Commissioners made an interim order authorizing the use by defendants of the form of shipping bill containing the above condition until further order.

It is admitted that the notice provided for in the above condition was not given.

This condition does not purport to "relieve" the company from "an action" for any "negligence or omission." What it does purport to do is to restrict or limit its liability by imposing

a condition providing for notice of claim within a limited time. It is, therefore, not inconsistent with sub-sec. 3 of sec. 214, but without the approval of the Board of Railway Commissioners it would be contrary to sub-sec. 1 of sec. 275. The Board has, however, authorized the use by the defendants of this class of contract, and have thus in my opinion, made it a legal and binding contract.

In *Grand Trunk R.W. Co. v. McMillan*, 16 S.C.R. 543, Strong, C.J., held a condition worded exactly the same binding upon the shipper, and Taschereau, J., concurred. Gwynne, J., delivered a judgment in which Fournier, J., concurred, holding that the words "station freight agent" meant a station freight agent on the defendants' own line. He said: "The condition plainly in my opinion, applies only to the case of goods which have reached a station on defendants' own line, which by the contract of carriage is designated as the terminus of the contract for carriage by railway, and as being the place most convenient for that purpose." It is quite evident, that, in the opinion of the whole four learned Judges who took part in the hearing, the conditions would be binding if the goods were shipped as in this case from one point to another on the same line of railway. In *Mason v. Grand Trunk R.W. Co.*, 37 U.C.R. 163, Wilson and Morrison, JJ., held under a similar condition that the giving of the notice was a condition precedent, though the place of delivery was off the defendants' railway. In *Gélinas v. Canadian Pacific R.W. Co.*, Q.R. 11 S.C. 253, it was held that the failure to comply with a similar condition was fatal to the plaintiffs' action.

These decisions were before the present Railway Act, but the Board of Railway Commissioners having placed upon the contract the seal of their approval, as they had authority to do under sec. 275, it is now as legal and binding as it was before the recent restrictive legislation.

In my opinion, the appeal should be dismissed with costs.

For a discussion of a somewhat similar clause see *James v. Dominion Express Co.*, ante p. 309.

FIRE FROM LOCOMOTIVE—EVIDENCE—NEGLIGENCE.

MANITOBA.]

[RICHARDS, J.

TAIT V. CANADIAN PACIFIC R.W. CO.

BAIN V. CANADIAN PACIFIC R.W. CO.

KELLETT V. CANADIAN PACIFIC R.W. CO.

(16 *Man. L.R.* 391.)

Railway—Negligence—Fire started by spark from locomotive—Evidence of cause of fire—Joinder of plaintiffs having separate causes of action arising out of same event—King's Bench Act, Rule 218—Costs.

If it appears from the evidence that there was no other possible cause for the starting of a prairie fire near a railway track than sparks from a passing locomotive, the proper conclusion to be drawn is that the railway company is liable, notwithstanding that the sparks must have carried the fire an unusual distance and that no evidence was given as to the condition of the smoke stack and netting at the time.

A number of plaintiffs joined in the Tait case presenting separate claims for losses by the same fire which plainly appeared by the statement of claim, to which the defendants filed a statement of defence without having moved to strike out any of the claims.

Held, without deciding whether Rule 218 of the King's Bench Act justified the joinder of plaintiffs in this case, that it was too late to take the objection of misjoinder at the trial.

A deduction was ordered to be made from plaintiff's counsel fees for the trial, because considerable time was taken up in proving title to the property destroyed which the defendants had not been asked to admit, and which would be presumed from mere possession as against tortfeasors.

THESE actions were brought, except as to the claim of Hogborg, one of the plaintiffs in the Tait case, for damages for loss of hay burned by a fire, claimed to have been caused by one of the defendants' locomotives. Hogborg's claim was for damages for the loss of his stable in the same fire.

1906. April 7th. *A. E. Hoskin* for plaintiffs cited *Oatman v. Michigan Cen. R.W.*, 1 O.L.R. 145; *New Brunswick R.W. Co. v. Robinson*, 11 S.C.R. 688; *Cahill v. Lon. & N.W.R.*, 10 C.B.N.S. 159.

J. A. M. Aikins, K.C., and *J. E. Coyne* for defendants.

1906. April 18th. RICHARDS, J.:—In the Tait case several claimants, in respect of separate losses, joined in suing. Defendants' counsel claimed at the opening of the trial that such claimants could only proceed by separate actions, and that plaintiffs' counsel must elect for which plaintiff he would proceed and strike out the others from his pleadings. If the plaintiffs had sued as for one cause of action only, and it had developed at the trial that their rights of action were separate, the point would be well taken. But here, the fact that they were suing in respect of separate claims, plainly appeared on the face of the statement of claim.

The defendants had full notice thereof when served with that statement. The defendants, if they thought the King's Bench Act, Rule 218, did not justify the joinder, could have moved at once to strike out all but one of the plaintiffs. They did not do so, but filed a statement of defence.

Without expressing any opinion as to whether Rule 218 justified the joining of the plaintiffs, I think that defendants lost the right to object when they pleaded to the statement of claim.

The facts are as follows:—

At between 2.30 and 3 p.m. on 20th November, 1904, as a train going west and drawn by defendants' locomotive number 549, was about two and a half miles west of Meadow's siding on the defendants' line of rail, a fire broke out in the dry grass, about 127 feet north of the centre of the track on which the train was moving. It started during, or immediately after, the passing of the train. It spread rapidly and burned all that day and the following night, and during the 21st of November. The fire destroyed 20 tons of hay and 24 tons of oat straw, the property of the plaintiff Tait; a stable, the property of the plaintiff Hogborg; 7 tons of hay, the property of the plaintiff Martin; 45 tons of hay, the property of the plaintiffs Brown & Rutherford; 85 tons of hay, the property of the plaintiff Peter Bain and 160 tons of hay, the property of the plaintiff Kellett.

When the fire started there was no one at or near the spot where it started, except the defendants' men on the passing train.

Some evidence was given to shew that the fire really started about a mile further west than where I find that it originated, and a mile north of the track, and an hour earlier than the time at which engine 549 passed. Apart from the weight of other testimony being against that contention, it is discredited by the fact that none of the train crew with engine 549 saw such a fire, though they would have been almost certain to notice it if it had been burning there before and while this train was passing.

Much testimony was gone into to establish that a spark, coming from a locomotive, built as No. 549 was, must lose its combustion before going half of the distance from the centre of the track to where I find that the fire started in the grass. But the fact remains, that there was no other possible way for it to start than from fire from locomotive 549. The day was bright and very dry, and a wind from the south, or a little east of south, was blowing across the defendants' track, with a velocity of about 30 miles an hour.

Evidence was given to shew that the smoke stack of engine 549 and its screen or netting were in good condition at a date several days before the fire and at another date some days later. But no evidence was called to shew their condition at the beginning or end of the trip during which the fire started.

It seems to me that I must be guided by facts, rather than by opinions, and must find that the prairie fire was caused by fire from the defendants' locomotive, carried alive an unusual distance by the high wind.

I find that Hogborg's building was worth \$125 and the hay \$4.50 per ton.

In the Tait case there will be judgment against the defendants, in favour of the different plaintiffs, for the following sums: Tait, \$138, the representative of Hogborg, \$125, Martin, \$31.50, and Brown & Rutherford, \$202.50, with one set of costs on the King's Bench scale.

In the Bain case there will be judgment for the plaintiff for \$382.50, with costs on the King's Bench scale.

In the Kellett case there will be judgment for the plaintiff for \$722, without costs to either party.

The three cases were tried together. In computing counsel fees, one-half day is to be taken off, because of the time occupied in proving the titles of the different plaintiffs to cut the hay where they did. The defendants should have been asked, before trial, to admit the titles, and their refusal shewn before taking up so much time. If they had refused, I might have allowed for the time, though it was unnecessary I think to prove more than possession as against tort feasers.

The balance of the time taken up is to be considered as occupied, one-half by the Tait case, one-quarter by the Bain case and one-quarter by the Kellett case.

Owing to the death, before trial, of the original plaintiff, Hogborg, I allowed the plaintiffs to put in evidence at the trial, his cross-examination for discovery as evidence in favour of his personal representatives only.

On thinking the matter over, I doubt the correctness of that ruling. In finding as I have, I have paid no attention to it.

The plaintiffs Brown & Rutherford are to be allowed to amend their statement of claim, so as to claim for the loss of 45 tons of hay.

NOTE.

In the case of *Blue v. Red Mountain B.W. Co. ante*, p. 219, an appeal from the judgment reported was argued in the Supreme Court of Canada on October 15th, 1907, and is now standing for judgment.

FIRES—CONFLICT OF DOMINION AND PROVINCIAL
LEGISLATION.

SASKATCHEWAN.]

[FULL COURT.

REX v. CANADIAN PACIFIC R.W. CO.

(6 West. L.R. 126.)

Constitutional law—Prairie Fires Ordinance—Intra vires—Application to Dominion railways—Conflict with Dominion legislation—Condition of Ordinance—Magistrates' convictions — Evidence before magistrate — Consideration by Court on certiorari—Jurisdiction to review—Negligency—Railway Act, 1903, secs. 25 (e), 239.

1. The provisions of the Prairie Fires Ordinance imposing penalties upon railway companies governed by the Dominion Railway Act for kindling fires and letting it run at large in the operation of locomotive steam engines on their railway are valid: *Rex v. Canadian Pacific R.W. Co.*, 1 West. L.R. 89, followed.
2. Where Provincial legislation imposing penalties for failing to observe the precautions to protect does not conflict with Dominion legislation upon the same subject the Provincial legislation is not rendered inoperative by such Dominion legislation.
3. Where Provincial regulations do not attempt to interfere with the structure of authorized works of the railway but merely require the removal of weeds or some alteration in its surface in order to prevent injury to other property, such legislation is not invalid, provided the management of the company's business as a railway and the railway works themselves are not interfered with: *Madden v. Nelson and Fort Sheppard R.W. Co.* (1899), A.C. 626, discussed: *Canadian Pacific R.W. Co. v. Notre Dame* (1899), A.C. 367, followed.

MOTION by the defendants to make absolute two rules *nisi* for writs of certiorari for the purpose of quashing convictions made against them for breach of the Prairie Fires Ordinance.

The motion was heard by Sifton, C.J., Wetmore, Prendergast, Newlands, Harvey and Stuart, JJ.

H. A. Robson, Winnipeg, for defendants.

Frank Ford, Regina, for the Crown.

April 30th, 1907. HARVEY, J.:—The section under which the convictions are made, as amended by the addition of sub-section

(2) in the first session of 1903, and of sub-section (3) in the second session of the same year, is as follows: —

“(2) Any person who shall either directly or indirectly, personally or through any servant, employee or agent—

“(a) Kindle a fire and let it run at large on any land not his own property . . . shall be guilty of an offence and shall on summary conviction thereof be liable to a penalty of not less than \$25 and not more than \$200, and in addition to such penalty shall be liable to civil action for damages at the suit of any person whose property has been injured or destroyed by any such fire.”

“2. If a fire shall be caused by the escape of sparks or any other matter from any engine or other thing, it shall be deemed to have been kindled by the person in charge or who should be in charge of such engine or other thing, but such person or his employer shall not be liable to the penalties imposed by this section if, in the case of stationary engines, the precautions required by section 12 have been complied with, and there has been no negligence in any other respect, or, in the case of railway or other locomotive engines, such engine is equipped with a suitable smoke stack netting and ash pan, netting in good repair and kept closed and in proper place, and in the case of railway engines where the line of railway passes through prairie country there is maintained for a distance of at least three miles continuously in each direction from the point at which the fire starts on each side of such line of railway and not less than 200 nor more than 400 feet therefrom a good and sufficient fireguard of ploughed land not less than 16 feet in width, kept free from weeds and other inflammable matter, and the space between such fireguard and such line of railway is kept burned or otherwise freed from the danger of spreading fire, and there has been no negligence in any other respect.”

“3. For the purpose of ploughing any fireguard, as in the next preceding sub-section provided, and of freeing from inflammable matter the land between such fireguard and the line of

railway, any railway company is hereby authorized to enter upon any uncultivated or unoccupied land, without incurring any liability therefor, provided that no unnecessary damage shall be done."

Several grounds were taken in the rule, but the only ones which were urged or argued on this motion are as follows:—

"5. That penalties imposed by a Provincial Legislature for the kindling of fire and letting it run at large do not apply to railway companies governed by the Dominion Railway Act in the operation of locomotive steam engines upon their railway."

"6. That the provisions contained in sub-section (2) of section 2 of the Prairie Fires Ordinance, as amended, whereby the penalties provided by the section are not to be imposed 'if in the case of railway or other locomotive engines such engine is equipped with a suitable smoke stack netting and ash pan, netting in good repair and kept closed and in proper place, and in the case of railway engines where the line of railway passes through prairie country there is maintained for a distance of at least 3 miles continuously in each direction from the point at which the fire starts on each side of such line of railway and not less than 200 nor more than 400 feet therefrom a good and sufficient fireguard of ploughed land not less than 16 feet in width, kept free from weeds and inflammable matter, and the space between such fireguard and such line of railway is kept burned or otherwise freed from the danger of spreading fire,' are in effect requirements of the Legislature of the North-West Territories or the Province of Saskatchewan that such recited precautions be observed under penalty for the want of such observance; that the accused company are a railway company formed, existing and operating under the laws of the Dominion of Canada, and as to such railway companies the provisions of said sub-section (2) requiring such precautions have been superseded by and are in conflict with the provisions of the Railway Act, 1903, and particularly section 25 thereof, whereby the Board of Railway Commissioners for Canada may make orders and regulations 'with respect to

the use on any engine, of nettings, screens, grates and other devices, and the use on any engine or car of any appliances and precautions, and, generally, in connection with the railway respecting the construction, use and maintenance of any fire-guard or works which may be deemed by the Board necessary and most suitable to prevent, as far as possible, fires from being started, or occurring, upon, along, or near the right of way of any railway.' "

"7. That the provisions of the amended section 2 regarding fireguards are *ultra vires* as regards railways governed by Dominion legislation."

The first objection which is numbered "5" is met by the decision of this Court against the same defendants in *Rex v. Canadian Pacific R.W. Co.*, 1 West L.R. 89, in which a conviction for the same offence was in question. I may also refer to *Grant v. Canadian Pacific R.W. Co.*, 36 N.B.R. 528, in which a somewhat similar Act of the Province of New Brunswick was held to apply to the defendant company.

The next objection, however, is that those decisions are not now applicable, because the Dominion Parliament has legislated on the subject, and even if the province or the Territories had the right to pass such legislation to affect Dominion railways at the time it was passed, it must be taken as being now overborne by the Dominion legislation.

The Dominion legislation referred to, and which is applicable to this case, is contained in paragraph (e) of section 25 of the Railway Act, 1903, which provides that the Board of Railway Commissioners which is constituted by that Act, may make orders and regulations:—

"(e) With respect to the use on any engine, of nettings, screens, grates, and other devices, and the use on any engine or car of any appliances and precautions, and, generally, in connection with the railway respecting the construction, use and maintenance of any fireguard or works which may be deemed by the Board necessary and most suitable to prevent, as far as

possible, fires from being started, or occurring, upon, along, or near the right of way of any railway"; and section 239 of the same Act, which is in the following terms: "239. The company shall at all times maintain and keep its right of way free from dead or dry grass, weeds, and other unnecessary combustible matter.

"2. Whenever damage is caused to crops, lands, fences, plantations, or buildings and their contents, by a fire, started by a railway locomotive, the company making use of such locomotive, whether guilty of negligence or not, shall be liable for such damage and may be sued for the recovery of the amount of such damage in any Court of competent jurisdiction;

"Provided that if it be shewn that the company has used modern and efficient appliances and has not otherwise been guilty of any negligence, the total amount of compensation recoverable under sub-section 2 of this section, in respect of any one or more claims for damage from a fire or fires started by the same locomotive and upon the same occasion, shall not exceed \$5,000, and it shall be apportioned amongst the parties who suffered the loss as the Court or Judge may determine."

"3. The company shall have an insurable interest in all such property upon or along its route, for which it may be so held liable, and may procure insurances thereon in its own behalf."

It does not appear to me to be necessary for the purposes of this case to consider whether the first sub-section of section 239 supersedes any portion of the Ordinance, for it is not in any way in conflict with it, and, in the view I take, the question of the proper penalty for breach cannot arise, having reference to the evidence. It is quite clear from section 25 (e) that this sub-section is not intended to cover the whole field, and therefore to supersede entirely the provisions of the Ordinance on the subject. It was not strongly urged, nor do I think it can be strongly urged, that the second sub-section of section 239 supersedes the provisions of the Ordinance. The provisions of the Act have reference to the civil liability alone, and are for the protection

of the individual injured; while the provisions of the Ordinance, as far as in question here, simply impose a penalty for the protection of the public generally.

As to section 25 (e) it is admitted that no rules and regulations have been made by the Board, and I am quite unable to see how it can be seriously contended that until that is done it is effective legislation by the Dominion. The point, moreover, appears to be settled by the decision in *Attorney-General for Ontario v. Attorney-General for the Dominion* (1896), A.C. 348, in which it was held that, notwithstanding the provisions of the Canada Temperance Act, the Provincial Act of Ontario permitting local prohibition in municipalities was valid and effective in municipalities in which the provisions of the Canada Temperance Act were not adopted, it being also a permissive Act with the same object as the Ontario Act. During the course of the argument Lord Watson, at page 354, said: "Where the Temperance Act is not adopted, there is no law as yet applicable, and there the field is not covered." It appears clear from this authority that the provincial legislation cannot be rendered inoperative by Dominion legislation, which is in itself inoperative and incomplete.

With regard to the last ground advanced, it is urged that the evidence shews that the conditions of the Ordinance other than those relative to the fireguards existed, and that those conditions are such as the Provincial Legislature has no right to impose. In support of the convictions, however, it is objected that the evidence cannot be looked at to support any such conclusion. As was pointed out in *Rex v. Canadian Pacific R.W. Co.*, 1 West L.R. 89, under section 8 of the Prairie Fires Ordinance, the burden is on the defendants of establishing the existence of the conditions necessary to relieve them of the penalties imposed by the Ordinance. It is not suggested that in the present cases there is not evidence to shew the contravention of the Ordinance, and thus to justify a conviction, in the absence of proof of the conditions establishing an exemption, but it is urged that, leaving aside the question of the fireguards, there is uncontradicted evi-

dence of the existence of all the conditions, and, that being uncontradicted, it should be believed, and the conclusion therefore arrived at that the decision of the magistrate is founded on the absence of fireguards the existence of which it is admitted is not proved.

It is in this regard, and in this regard only, that the two convictions differ. In the one where the fire started near Mortlach, admissions were made by the prosecutor "that the engine was inspected and in proper order," and "that the engine was properly operated." In the other case, where the fire started near Ernfold, there were no admissions, and I will consider it first. The authorities do not appear to be entirely clear as to whether the evidence may be looked at on certiorari, but I can find no authority that would justify the conclusion that it could be looked at and weighed as would require to be done to support the defendants' contention. This is not an appeal. There is an appeal from such a conviction to a Judge of this Court, and on such an appeal the evidence could be considered and weighed. In *Rex v. Bolton*, 1 Q.B. 66, a motion to quash on a return to a certiorari, Lord Denman in delivering judgment at page 72 said: "All that we can do, when their (the magistrates') decision is complained of, is to see that the case was one within their jurisdiction and that their proceedings on the face of them are regular and according to law"; and at page 73: "When a charge has been well laid before a magistrate on its face bringing itself within his jurisdiction he is bound to commence the inquiry; in so doing he undoubtedly acts within his jurisdiction; but in the course of the inquiry evidence being offered for and against the charge, the proper, or it may be the irresistible, conclusion to be drawn may be that the offence has not been committed, and so that the case, in one sense, was not within the jurisdiction. Now to receive affidavits for the purpose of shewing this is clearly in effect to shew that the magistrate's decision was wrong if he affirms the charge and not to shew that he acted without jurisdiction. . . . Upon principle, therefore, affidavits cannot be received under such circumstances. The question of jurisdiction

does not depend on the truth or falsehood of the charge, but upon its nature; it is determinable on the commencement, not at the conclusion, of the inquiry." This case is constantly referred to in the later cases, and was approved and followed by the Privy Council in *Colonial Bank of Australia v. Willan*, L.R. 5 P.C. 417. In that case, at page 443, it is stated that *Rex v. Bolton* is an example of the authorities which establish that "an adjudication by a Judge having jurisdiction over the subject-matter is, if no defects appear on the face of it, to be taken as conclusive of the facts stated therein; and that the Court of Queen's Bench will not on certiorari quash such an adjudication on the ground that any such fact, however essential, has been erroneously found." Likewise it has been held in our own Court in *Queen v. O'Kell*, 1 Terr. L.R. 79, that the Court cannot review the magistrate's conclusion, and that "the law is clear that where the charge is one that if true is within the magistrate's jurisdiction, the finding of the facts by him is conclusive and is not open to review here." In the last mentioned case the evidence was looked at for the purpose of ascertaining whether there was evidence of the offence charged. There are other Canadian cases in which this appears to have been done, but, so far as I have been able to find, that is the utmost limit to which there is an appeal. What is asked here, however, is that the evidence be looked at and a decision given that there is not simply evidence, but proof of certain facts. It is the same as if the Court were asked on certiorari to make a conviction where a dismissal had taken place. This was done in *King v. Reason*, 6 Terr. L.R. 375. In the report of this case it is stated that "The Court said that the evidence given was entirely and exclusively for the consideration of the justices below, who were placed in the situation of a jury, and, as they had acquitted the defendant, this Court could not substitute themselves in the place of the justices acting as jurymen and convict him. That they could not judge of the credit due to the witnesses whom they did not hear examined. That they could only look to the form of the conviction and see that the party, if convicted, had been convicted by legal evidence,

and that they must consider on this return that the magistrates had determined on the facts and not on the law of the case as distinguished from the facts." The last sentence is important, because in that case, as in the one before us, it was a question of the magistrate having erred in the law. It appears to me beyond question that on these authorities it is not open to this Court to usurp the functions of the justices and find any facts proved which they do not appear to have found proved.

As to the Mortlach case it is urged that the admissions leave nothing but the question of the fireguards. Without examining the admissions carefully to determine their purport, and without considering their effect, it appears to me that, giving the defendants the fullest benefit possible from them, there is still the general question of negligence. The meaning of the exemption in sub-section 2 appears to be that if there has been no negligence there is no liability, certain illustrations of what will be negligence being stated. What other negligence there might be is for the justices' consideration. If they err, the Court of Appeal is the place to have the error corrected, not this Court, on such an application as this.

I am not prepared to say what might be other negligence. It would depend on the circumstances of the case, and would be determinable on the evidence by the justices. The evidence shews that the fire started in the defendants' right of way, in the grass which had not been burned or otherwise cleared away. Apart from the provisions of sub-section 1 of section 239 of the Railway Act, 1903, above quoted, the case of *Rainville v. Grand Trunk R.W. Co.*, 28 O.R. 625, 25 A.R. 242, affirmed in appeal, 29 S.C.R. 201, 1 Can. Ry. Cas. 113, 117, 125, shews that the presence of this grass, for one thing, might be considered as negligence, even though the provisions of the Ordinance regarding its removal were invalid. It is said that, being specially mentioned by the Ordinance, it is not other negligence. To give such a meaning would not, in my opinion, give effect to the spirit of the Ordinance, and would not be justified, the intention of the exemption being, as I have indicated, the absence of all negligence.

It appears to me, therefore, that in the Mortlach case, as in the Ernfold case, it is not competent for this Court to say that the justices founded their decision on the view that the provisions of the Ordinance respecting fireguards were valid and binding, but, even if they did, in my opinion that would be no ground for quashing the convictions, for it appears to me that they are, without doubt, within the competence of the Legislature to pass as applicable to Dominion railways.

That the Ordinance in question was passed by the Legislature of the North-West Territories does not appear to me to be material. By virtue of the Saskatchewan Act it has become provincial law, and the power of the territorial legislature was, so far as the matter under consideration is concerned, practically identical with that of a Provincial Legislature.

The scheme of division of legislative power under the British North America Act has been considered by the Judicial Committee in numerous cases, and from the decisions the following general principle appears to be deducible, namely, that, in the absence of Dominion legislation on matters that are not of the essence of the subject-matters exclusively reserved to the Dominion Parliament by section 91, but are merely ancillary thereto, the province may legislate if the method of treatment in such legislation is to make it come properly within any of the classes of legislation reserved to the province by section 92. In the late Privy Council case decided last year, *Grand Trunk R.W. Co. v. Attorney-General for Canada*, 76 L.J.P.C. 23, Lord Dunedin, who delivered the judgment, says: "A comparison of two cases decided in the year 1894, namely, *Attorney-General for Ontario v. Attorney-General for Canada* (1894), A.C. 189, and *Tennant v. Union Bank of Canada* (1894), A.C. 31, seems to establish these two propositions: First, that there can be a domain in which provincial and Dominion legislation may overlap, in which case neither legislation will be *ultra vires*, if the field is clear; and secondly, that if the field is not clear, and in such a domain the two legislations meet, then the Dominion legislation must pre-

vail." In the former of the two cases mentioned, the Provincial Assignments Act was held *intra vires*, and, referring to it in *Huson v. Township of South Norwich*, 24 S.C.R. 145, at p. 155, Taschereau, J., says: "It results from that case, if I do not misunderstand it, that there are under the British North America Act, subjects that may be dealt with by both legislative powers, and that the provincial field is not to be deemed limited by the possible range of unexercised power by the Dominion Parliament, so that a power conferred upon the latter, but not acted upon, may, in certain cases, be exercised by the Provincial Legislatures, if it fall within any of the classes of subjects enumerated in section 92." The validity of the Ordinance under consideration is not questioned otherwise than in its application to Dominion railways, and therefore it is conceded that it falls within one or more of the classes of subjects enumerated in section 92, and the only question then to consider is, whether it deals with matters essential or only ancillary to Dominion railway legislation; as I have pointed out before, there is no effective Dominion legislation with which it can be said to be in conflict. The fact that ever since Confederation there has been legislation by the Dominion covering the field of Dominion railways, without any provisions upon the subject of the provisions of the Ordinance, appears to me a very strong argument in favour of the view that it cannot be deemed to be essential to such railway legislation, and that therefore it is *intra vires* so long as the field is clear.

The defendants rely very strongly on the case of *Madden v. Nelson and Fort Sheppard R.W. Co.* (1899), A.C. 626, in which it was decided that an Act of the Province of British Columbia, which declared that railway companies within the authority of the Parliament of Canada which did not fence their right of way should be liable for damage for cattle killed or injured by their trains, was *ultra vires*. It does not appear to me that that case governs the present one at all. It is not denied that if the Dominion had, as part of its railway legislation, made provisions for protection from prairie fires in conflict with the provisions of the

Ordinance, or covering the field, the provisions would thereupon cease to be applicable to Dominion railway. In the *Madden case*, at the time the Act thereby declared *ultra vires* was passed, there was, as part of the Dominion Railway Act of 1888, provision for the erection of fences and other safeguards for the protection of animals, and for the liability for failure to comply with such provisions. What the province attempted to do, and what in the preamble to the Act it shewed it intended to do, was to impose a further obligation and liability on the same subject. This it clearly had no right to do, the obligation and liability having been fixed by the Dominion legislation, and the field of legislation having been thereby occupied. As it is stated in the judgment at page 628: "It would have been impossible, as it appears to their Lordships, to maintain the authority of the Dominion Parliament if the Provincial Parliament were to be permitted to enter into such a field of legislation, which is wholly withdrawn from them, and is therefore manifestly *ultra vires*." The case of *Canadian Pacific R.W. Co. v. Notre Dame de Bonsecours*, decided a couple of months earlier, (1899) A.C. 367, seems to me to be much more applicable. It is perfectly clear from that and many other cases that it is no objection to the validity of a provincial law that it imposes burdens on railway or other corporations which are subject only to the Dominion. At page 372, in the judgment of Lord Watson, it is stated: "The British North America Act, whilst it gives the legislative control of the appellants' railway, *qua* railway, to the Parliament of the Dominion, does not declare that the railway shall cease to be part of the provinces in which it is situated, or that it shall, in other respects, be exempted from the jurisdiction of the Provincial Legislatures. Accordingly, the Parliament of Canada had, in the opinion of their Lordships, exclusive right to prescribe regulations for the construction, repair and alteration of the railway, and for its management, and to dictate the constitution and powers of the company; but it is, *inter alia*, reserved to the Provincial Parliament to impose direct taxation upon those portions of it which are within the provinces, in order to the raising of a

revenue for provincial purposes. It was obviously in the contemplation of the Act of 1867 that the 'railway legislation,' strictly so called, applicable to those lines which were placed under its charge, should belong to the Dominion Parliament. It, therefore, appears to their Lordships that any attempt by the Legislature of Quebec to regulate by enactment, whether described as municipal or not, the structure of a ditch forming part of the appellant company's authorized works, would be legislation in excess of its powers. If, on the other hand, the enactment had no reference to the structure of the ditch, but provided that, in the event of its becoming choked with silt or rubbish, so as to cause overflow and injury to other property in the parish, it should be thoroughly cleaned out by the appellant company, then the enactment would, in their Lordships' opinion, be a piece of municipal legislation competent to the Legislature of Quebec."

Now, it appears to me that in the case before us, all that is required is the removal of the combustible matter on the surface for the same purpose as was in view in that case, namely, to prevent injury to other property, and that it does not in any way attempt to interfere with the structure of the authorized works of the railway. The primary purpose of the ploughing is to permit the space between to be burned without danger to property beyond. If the provisions are all complied with, there will be a space of a certain width, through which the track runs, deemed to be wide enough to catch all sparks emitted from the engines which will be entirely free from any matter of a combustible nature, and thereby the danger of such sparks starting a fire will be removed.

I cannot see how it can be said that the ploughing interferes with the works of the railway. It does not in any way affect the track or the right of way or other property of the company, and so is quite different from a fence on or bounding the right of way. It does not in any way interfere with the management of the company's business as a railway. It simply is something which the company may do on other people's property on which

it is authorized to go for that purpose, and is entirely independent of its business as a railway company.

I am of opinion, therefore, that until the Dominion Parliament occupies the field, the Ordinance in question applies to Dominion railways.

As in my view none of the defendants' grounds can be sustained, the rules should be discharged.

SIFTON, C.J., PRENDERGAST, NEWLANDS and STUART, JJ., concurred.

WETMORE, J.:—I agree with the conclusion arrived at by my brother Harvey in the *Ernfold case*. Sub-section (2) of section 2 of the Prairie Fires Ordinance, chapter 87 of the Consolidated Ordinances, as amended by chapter 25 of the first session of 1903, cast the burden of proving that the engine and apparatus were in proper repair and properly operated, upon the company. If the company failed to satisfy the justice of that fact, it was his duty to impose a penalty. We are unable to assume in this case that the company did establish to the satisfaction of the justice that the engine and apparatus were in good repair and properly operated. I am of opinion that the authorities fully bear out the proposition that where the question is one entirely of fact, this Court cannot by certiorari quash the conviction; at any rate unless there is a total absence of any evidence to warrant a conviction.

This Court held in *Rex v. Canadian Pacific R.W. Co.*, 1 West L.R. 89, that the Ordinance was *intra vires* in requiring that the company's engines should be equipped in the manner prescribed and the netting kept closed and in the proper place. That is the law as we understood it at the time that decision was given, and, in my opinion, it is the law yet. I can find no legislation either in the Dominion Railway Act, or in any regulation made under its provisions, which lays down a different law, and until some legislation or duly authorized regulation is made by some proper authority, that law, as interpreted by the case cited, still remains in force. I am, therefore, of opinion that the rule in this case should be discharged.

As to the *Mortlach* case, however, I regret that I cannot agree with my brother Harvey. In *Rex v. Canadian Pacific R.W. Co.*, before cited, at page 93, I expressed a doubt whether the duty cast upon the company to make fireguards was within the power of the local Legislature, and I have come to the conclusion that these doubts were well founded. Sub-section (2) before referred to, of the Ordinance in question, has, to my mind, two provisions so far as railways are concerned. First, there is the provision where fire is caused by the escape of sparks or igneous matters from an engine, and such engine is not equipped with suitable smoke stack and appliances in good repair, and kept closed and in proper place; second, in cases where the line of railway passes through prairie country, a good and sufficient fireguard is not made and kept free from weeds and other inflammable matter, and the space between the fireguard and line of railway kept burned or otherwise freed from the danger of spreading fire, and there is no negligence in any other respect.

In this case it was admitted on behalf of the prosecution that the engine was inspected and in proper order, and that it was properly operated. I take the fair meaning of that to be that the prosecution did not purpose to base their case upon the engine not being properly equipped, or upon its being improperly operated in so far as the provisions in the sub-section in question were concerned. They practically abandoned any case in so far as those questions were concerned. I take that to be a reasonable construction to put upon the admission referred to. This brings us to the question of the fireguard. To my mind, it just narrows itself down to this: Had the local Legislature power to compel the company to plough a fireguard practically the whole length of its distance through prairie country, or take the consequences of being liable to a penalty if it did not do so, and a fire occurred from sparks from one of their engines. The burning of weeds between the fireguard and the line of railway and keeping it freed from weeds and other inflammable matter is merely an incidental matter. Everybody who is acquainted with this country, knows that in the fall of the year the prairie grass is

very inflammable, and that any attempt to burn off the grass on the railway right of way without first ploughing a fireguard would almost inevitably result in the fire running at large over the whole country. The fireguard provided for by the Ordinance in the nature of things intended to prevent the fire which was to be lit either to burn off the grass or the weeds between it and the railway, from escaping. The language of the sub-section indicates that the fireguard is to be ploughed first, because it provides that the space "between such fireguard and such line of railway is to be kept burned or otherwise freed from the danger of spreading fires." I am of opinion that such legislation was not within the power of the local Legislature, because I cannot distinguish this case on principle from *Madden v. Nelson and Fort Sheppard R.W. Co.* (1899), A.C. 626. In *Canadian Pacific R.W. Co. v. Notre Dame de Bonsecours* (1899), A.C. at p. 373, Lord Watson lays down the following: "It therefore appears to their Lordships that any attempt by the Legislature of Quebec to regulate by enactment, whether described as municipal or not, the structure of a ditch forming part of the appellant company's authorized works, would be legislation in excess of its powers. If, on the other hand, the enactment had no reference to the structure of a ditch, but provided that, in the event of its becoming choked with silt or rubbish so as to cause overflow and injury to other property in the parish, it should be thoroughly cleaned out by the appellant company, then the enactment would, in their Lordships' opinion, be a piece of municipal legislation competent to the Legislature of Quebec." Now, the legislation in this case does not deal merely with the proper looking after some work already constructed of a character similar, or somewhat similar to a ditch, but the Legislature calls upon them actually to construct a fireguard, and I think that this case is within what was laid down by Lord Watson in the last mentioned case, as not being within the power of the local Legislature. I think in the *Mortlach case* the rule should be made absolute for a certiorari.

CONSTITUTIONAL LAW—MECHANIC'S LIEN.

ONTARIO.]

[COURT OF APPEAL

CRAWFORD V. TILDEN ET AL.

(14 O.L.R. 572.)

Constitutional Law—Mechanics' Lien Act—Dominion Railway.

A lien under the Mechanics' and Wage Earners' Lien Act, R.S.O. 1897, ch. 153, cannot be enforced against the railway of a company incorporated under a Dominion Act, and declared thereby to be a company incorporated for the general advantage of Canada.

Decision of a Divisional Court, 13 O.L.R. 169, *ante* p. 300, affirmed.

THIS was an appeal by the plaintiff from the order of a Divisional Court, 13 O.L.R. 169, *ante* p. 300, allowing an appeal by the defendants the Guelph and Goderich Railway Company from the judgment of Clute, J., at the trial, and dismissing the action as against the railway company.

The action was begun by statement of claim, under the Mechanics' Lien Act, against Tilden & Co., M. A. Piggott & Co., and the railway company, to enforce a wage-earner's lien. The work for which the plaintiff claimed a lien was done for Tilden & Co., who were sub-contractors under M. A. Piggott & Co., contractors for a portion of the building of the defendant company's railway.

The Divisional Court held that the Mechanics' Lien Act did not apply to the defendant railway company.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A., on the 25th January, 1907.

E. L. Dickinson, for the plaintiff. The Mechanics' Lien Act is not a law in relation to a railway company, within the meaning of cl. (c) of sub-sec. 10 of sec. 92 of the British North America Act, and so excluded from the legislative jurisdiction of the Province; it does not seek to affect the constitution, management, government, or construction of any such company, or in any way to deal

with its undertaking as a railway, but it is purely an Act respecting property and civil rights and civil procedure within the Province, within the meaning of sub-sec. 13 of sec. 92 of the British North America Act, and affects railway companies only in common with all other employers of labour within the Province: *Canada Southern R.W. Co. v. Jackson* (1890), 17 S.C.R. 316, 325; *Canadian Pacific R.W. Co. v. Corporation of Notre Dame de Bonsecours*, [1899] A.C. 367, 372; *Wile v. Bruce Mines R.W. Co.* (1906), 11 O.L.R. 200; *Citizens Insurance Co. of Canada v. Parsons* (1881), 7 App. Cas. 96; *Madden v. Nelson and Fort Sheppard R.W. Co.*, [1899] A.C. 626; *Attorney-General for Ontario v. Attorney-General for Canada*, [1894] A.C. 189; *Grand Trunk R.W. Co. of Canada v. Attorney-General for Canada*, [1907] A.C. 65; Holmsted's *Mechanics' Lien Act*, p. 47. In order to work out the remedies provided by the *Mechanics' Lien Act*, it is not necessary to sell the railway by piecemeal, or in any way disintegrate the road, at all events where, as here, the whole road is within the Province, because the lien declared by the Act is imposed not upon any particular portion thereof, but upon the whole undertaking, and is not limited to that portion of the line upon which the work was performed: see sec. 4 and sec. 17, sub-sec. 3, of the Act. In the present state of the law there is nothing to prevent the sale under provincial process of a railway as an integer. The case of *King v. Alford* (1885), 9 O.R. 643, was decided under different conditions, and largely upon the ground that the Legislature had conferred powers upon railway companies for the public interest, and upon the understanding that the undertaking should not be diverted to any other purpose, under proceedings *in invitum*, by a purchaser who would have no power to operate the railway; but this reasoning has no longer any force, because sec. 240 of the *Railway Act* of 1903 recognizes the liability of a railway to be sold under any lawful proceedings, and provides means whereby the purchaser can operate the same. Such a sale no longer conflicts with the public interest: *Redfield v. Corporation of Wickham* (1888), 13 App. Cas. 467; *Toronto General Trusts Corporation v. Central Ontario R.W. Co.* (1903), 6 O.L.R. 1, (1904), 8 O.L.R. 342; *S. C., sub nom. Central*

Ontario R.W. Co. v. Trusts and Guarantee Co., [1905] A.C. 576; Wallace on Mechanics' Liens, p. 10. Even if it should be held that no lien against the lands of a railway company can exist, yet the charge created by the Act upon the percentage of the contract price directed to be retained, is a valid one, which the plaintiff is entitled to have enforced.

E. D. Armour, K.C., for the defendants the Guelph and Goderich Railway Company. These defendants, being a Dominion railway company, are not subject to the legislation of the Province. The Mechanics' Lien Act is direct legislation respecting railways and other structures, defining them, and affects to render the thing itself, whether a house or a railway, subject to the lien, and to displace all other claims in its favour. As a direct attempt to affect a Dominion company, and the property thereof, the Ontario legislation is void. Works declared to be for the general advantage of Canada by the British North America Act, sec. 92, sub-sec. 10 (c), are made expressly the subject of the exclusive jurisdiction of the Parliament of Canada, by sec. 91, sub-sec. 29. By the Dominion Railway Act, the mortgage and bonds authorized are made a first charge on the whole undertaking, etc., and to allow the Mechanics' Lien Act to displace the lien created by Parliament in favour of one created by the Legislature of Ontario, would be to hold that the Legislature of Ontario has authority to change the whole status created by Dominion legislation admittedly within its own sphere. In any event, the Mechanics' Lien Act can be applied only to a railway lying wholly within a registration division. A mechanics' lien is preserved and realized only by registration and subsequent proceedings. It cannot extend beyond the land described in the registered instrument which is the basis of the proceedings. Here the lien was claimed on lands in the county of Huron. The action could only proceed as to the same lands. An amendment to the pleadings, claiming a lien on the whole railway, could not effectually be made, because the registered lien cannot be amended. Thus no lien is claimed, or can be, except upon the lands in Huron. The Mechanics' Lien Act gives a lien on the railway, not on any part thereof. If a lien is claimed on

part only, it is void in its inception, not being authorized by the Act. Under the Act the railway can only be sold as an integer, and no provision is made for sale of a part or for a lien on a part; therefore no railway can be the subject of a mechanic's lien unless it lies wholly within the registration division where the lien is claimed. The right to a charge on a proportion of the contract price can only exist where there is a right to a lien on the land. But the Act cannot apply to a Dominion railway at all. *Larsen v. Nelson and Fort Sheppard R.W. Co.* (1895), 4 B.C.R. 151, is a direct decision in our favour. See MacMurchy and Denison's *Cases on the Railway Acts*, p. 26; *City of Toronto v. Bell Telephone Co.*, [1905] A.C. 52.

A. M. Stewart, for the defendants *M. A. Piggott & Co.*

Dickinson, in reply. By sec. 90 a substantial compliance only is required. The position of mortgagees and bondholders cannot be affected by the proceedings.

April 22, 1907. OSLER, J. A.:—The case was, if I may be allowed to say so, extremely well argued on both sides, but the appellant has failed to convince me that the judgments delivered in the Divisional Court are wrong. I cannot add anything to the judgments of the learned Chancellor and of Mabee, J., which shew very clearly and satisfactorily that the lands of the respondent railway company are not subject to a mechanic's lien, and that such a lien cannot be enforced against them under the Mechanics' Lien Act of Ontario.

MEREDITH, J.A.:—Where power to build and maintain a railway is conferred, the rights of the public in the concern, as a highway, are of paramount importance; and private interests and rights are necessarily invaded, and obliged to suffer to some extent, for the welfare of the many. It was, therefore, a very short and necessary step for the Court to take in denying to creditors of the owners of the road any of their ordinary rights the enforcement of which would defeat the paramount purpose in conferring the right to build and maintain the road—would destroy or materially curtail its public usefulness.

Such considerations are just as applicable to-day as they were in the days when the cases denying such rights, were decided. But legislation has since been passed in aid of the creditor. That in question boldly giving the right to sell irrespective of consequences; and the other, which indirectly aids by providing that the rights of the company may be exercised by the purchaser, and so removes the cause for the decisions against private rights.

The appellant is seeking to enforce a claim, for money, against the railway company, by a sale of a portion—probably one-half—of the railway.

The railway is one which comes under the exclusive power of Parliament, being expressly excepted from the local works and undertakings over which exclusive power is given to Provincial Legislatures.

Dealing with the case in the more orderly and convenient manner, the first question for consideration is whether federal legislation, directly or indirectly, permits such a sale as that which the appellant seeks.

Section 299 of the Railway Act—R.S.C. 1906, ch. 37—provides a means by which any railway, or any section of a railway, sold under any lawful proceeding, may be run or operated by the purchaser, or eventually otherwise dealt with as might be determined by the Governor in council; and this, or a like provision, has been considered a sufficient removal of the cause for denying a right of sale in aid of private interests: see *Central Ontario R.W. Co. v. Trusts and Guarantee Co.*, [1905] A.C. 576. It plainly recognizes a right to sell in such a case. I assume this provision to be applicable to this case; and, if applicable, can perceive no good reason why a civil right, conferred upon a creditor by provincial legislation, to sell a debtor's property for the purpose of payment of the debt, would not be a "lawful proceeding" within the meaning of this legislation. But I am unable to perceive how so much of the lands of this railway as happen to be within the territorial limits of the county of Huron can be considered a railway, or a section of a railway. The context shews very plainly that the section of a railway, in respect of which this parliamentary pro-

vision was made, must be one which is capable of being "run or operated." To permit a sale of a part which is incapable of practical use without the rest, and which sale would destroy the usefulness of the rest, would be a very flagrant violation of the principle before referred to.

Federal legislation, therefore, does not aid the appellant.

But reliance was placed, and mainly, if not entirely, placed, upon provincial legislation, which, in plain terms, has given the appellant a right of sale such as he seeks, even against a railway under the exclusive power of Parliament, but with this saving clause, "in so far as the Legislature of this Province has authority, or jurisdiction, in regard thereto."

The creation of a right such as the appellant alleges, and the enforcement of it in the manner sought, are matters which come within the meaning of "property and civil rights in the Province," subjects which are within the exclusive legislative power of the provincial legislature; but an enactment, under such general power, which encroaches upon the exercised power of Parliament in respect of any particular subject coming under its exclusive jurisdiction, cannot prevail; and the enactment in question distinctly does that; the principle before referred to, and the cases decided upon it, shew that any exercise of private rights which would extinguish, or substantially impair, the public rights and interests in the railway, as a highway, is in direct conflict with the federal legislation providing for the building and maintenance of the road. The legislation which gave the power to sell this railway piecemeal, was, therefore, *ultra vires*, or, to speak more accurately, such legislation is rendered inapplicable to the railway in question by the restricting clause which I have quoted.

It was said that the lien might be applied to the whole of the road, in order that relief might be given to the appellant; but that was not the appellant's claim in, nor the judgment at the trial of, the action. Nor can I think the enactment relied upon would warrant it. Under the 17th section, the lien is to be registered "in the registry office of the registry division . . . in which the land is situated." It is hardly likely that the Legislature in-

tended to give a workman employed upon a railway in the county of Huron a lien upon it in the county of Glengarry, for instance, with all the difficulties such a right would create, and the manifest injustice it might do to others having better rights in that distant county.

For these reasons, I think the appeal should be dismissed; and I think it proper to add that, if they did not prevail, the case would need careful consideration, in regard to the necessary and proper parties to it, the nature and extent of the appellant's rights, the rights and interests of other persons who may be very much concerned in the nature and effect of the judgment, and the character and extent of the relief which ought to be given. The case seems to have been dealt with somewhat hastily at the trial, on the supposition that the persons more directly concerned in the appellant's claim would pay or settle it, and that a sale would be unnecessary, and was very improbable. But, in any case, it is to be observed that the substance of the enactment is the sale; it would be little use to give a lien—any other word would be as effectual—if there were no means of enforcing it.

Moss, C.J.O., GARROW and MACLAREN, JJ.A., concurred.

NEGLIGENCE—WORKMEN'S COMPENSATION ACT.

ONTARIO.]

[COURT OF APPEAL.

MUMA V. CANADIAN PACIFIC R.W. CO.

(14 O.L.R. 147.)

Railway—Work Train—Rule as to Protecting by Flagmen—Other Precautions—Absence of Continuous Air Brakes—3 Edw. VII. ch. 58, sec. 211 (D.)—Absence of Liability at Common Law—Liability under Workmen's Compensation Act.

The deceased, who was in charge of a gang of labourers, employed in removing earth from a cutting on the defendants' railway, acting, as he believed, in the company's interests, to prevent the loss to them of the labourers' time, by the work train engaged in the work being kept at a siding, induced the conductor in charge of the train to move it on to the main track, and to proceed to the cutting, by backing the train slowly. By one of the company's rules, the train should not have been moved,—unless other sufficient precautions were taken,—until flagmen were placed at stated intervals in front and rear of the train. Flagmen were not placed; but the conductor took the precaution of standing himself, as a lookout, on the top of the van, and for a like purpose placed the deceased in the cupola, while it was the duty of the engine driver to keep a strict lookout towards the conductor, so as to observe his signals and to act upon them. When the train was distant some 600 yards from another work train approaching them, also moving slowly, the conductor signalled the engine driver to stop, and had he done so, a collision which occurred, whereby the deceased was killed, would have been avoided:—

Held, that the company were liable, under the Workmen's Compensation for Injuries Act, for the deceased's death through the neglect of the engine driver.

Deyo v. Kingston and Pembroke R.W. Co. (1904), 8 O.L.R. 538, distinguished. Liability was claimed at common law by reason of the train not being furnished throughout with air brakes, as required by the Railway Act, 3 Edw. VII. ch. 58, sec. 211 (D.):—

Held, that no such liability existed, for the train was not a passenger train, and the accident did not occur through the want of brakes, but by reason of the engine driver's failure to see and act on the conductor's signal.

THIS was an appeal by the defendants from a judgment entered by Clute, J., at the trial, in favour of the plaintiff, upon the answers of the jury to questions submitted to them.

The action was tried at Brantford on the 22nd and 23rd October, 1906.

J. Harley, K.C., for the plaintiff.

Shirley Denison and *G. A. Walker*, for the defendants.

The pleadings, evidence, and the questions submitted to the

jury, with their answers thereto, are fully set out in the judgment of this Court.

On February 11th, 1907, the appeal was heard before Moss, C.J.O., GARROW and MACLAREN, JJ.A.

G. T. Blackstock, K.C., and *Angus MacMurchy*, for the appellants. There can be no recovery here, as the accident was attributable to the deceased himself. He was the author of his own wrong. He was in charge of the train, and it was at his instigation that the train was started, and knowing what the rules of the company were, he disobeyed the rule as to flagging the train. The action comes within *Deyo v. Kingston and Pembroke R.W. Co.* (1904), 8 O.L.R. 538; see also *Fawcett v. Canadian Pacific R.W. Co.* (1902), 32 S.C.R. 721. Even if the conductor is to be deemed to be in charge of the train, it having been started at the express request of the deceased, he must assume the responsibility therefor. He voluntarily incurred the risk in going on the train: *Smith v. Baker*, [1891] A.C. 325. The jury should have been asked to find on this point. He was guilty of contributory negligence, and there should have been a finding on this point also: *Coyle v. Great Northern R.W. Co.* (1887), L.R. 20 Ir. 409, at p. 418; *Phillips v. Grand Trunk R.W. Co.* (1901), 1 O.L.R. 28; *Morrow v. Canadian Pacific R.W. Co.* (1894), 21 A.R. 149. There is no liability at common law, as the accident happened through the negligence, if any, of a fellow servant. It was also contended that there was a liability at common law because the train was not sufficiently supplied with brakes. It was not necessary, however, that a train such as this should be so supplied, for the Railway Act only applies to passenger trains, and moreover the accident was not occasioned by want of proper brakes, no attempt having been made to use the brakes until the trains were almost in collision, and the uncontradicted evidence of the experts shews that the brakes were ample: The Railway Act, 1903, 3 Edw. VII. ch. 58, sec. 211 (D.); *Grand Trunk R.W. Co. v. McKay* (1903), 34 S.C.R. 81; *Schwob v. Michigan Central R.W. Co.* (1905), 9 O.L.R. 86; 10 O.L.R. 647. There

was no cause of action under the Workmen's Act. The findings of the jury are against the evidence and the weight of evidence.

J. Harley, K.C., for the respondent. The deceased was not in charge of the train. It was in charge of the conductor, who was responsible for its being started. The deceased was merely a passenger, and taking into consideration the number of persons who were being carried on the train, it must be deemed to be a passenger train, and subject to the provisions regarding such trains, and so it was essential that it should have been supplied with air brakes throughout, and there was, therefore, a liability at common law. No questions of voluntarily incurring the risk, or of contributory negligence arise as they were not set up in the pleadings. It was the duty of the defendants if they desired a finding on these points to have raised the questions on the pleadings and obtained findings of the jury thereon: *Canada Foundry Co. v. Mitchell* (1904), 35 S.C.R. 452. The Workmen's Act clearly applies: *Williams v. Birmingham Battery and Metal Co.*, [1899] 2 Q.B. 338. Under the company's rule it is not absolutely essential that there should have been flagmen. This is only necessary where other sufficient precautions are not taken and such precautions were taken here. The evidence shews that the accident happened through the negligence of the persons in charge of the train. Had the engineer of the train been on the lookout, he would have seen the conductor's signal to stop and the accident would have been avoided.

March 14, 1907. *Moss, C.J.O.*:—The action was brought by Sarah Louise Muma, the widow and administratrix of Samuel Edward Muma, on behalf of herself and five infant children, to recover damages for the death of her late husband while in the defendants' employ, owing to a collision between a gravel or extra work train, as it was called, and an extra pile driver train, on a portion of the defendants' railway.

The claim was laid as at common law under the Fatal Injuries Act, and also under the Workmen's Compensation for Injuries Act.

In their defence the defendants, besides denying the allegations of the statement of claim, set up that if the deceased suffered injuries and died under the circumstances set forth in the statement of claim, the collision was caused by the negligence of a fellow-servant. In the alternative they set up that the collision happened by reason of the negligence of some person or persons in the employ of the defendants who had charge of or control of locomotive engines and trains upon the defendants' railway; and that their liability to the plaintiff was limited to the sum of \$2,102.03, that being equivalent to the estimated earnings during three years preceding the injury of a person in the same grade employed during that period in a like employment; and they alleged that they had always been ready and willing to pay that sum, and they brought the said sum into Court in full satisfaction of the action.

The defendants also, in answer to the claim at common law and under the Fatal Injuries Act, set up the receipt by the plaintiff of the proceeds of an accident policy effected by the deceased for the sum of \$1,000, and claimed that any damages awarded under these heads should be diminished by the amount of the policy.

The plaintiff joined issue and the action proceeded to trial.

The deceased was in the defendants' employ as section foreman in charge of a gang of labourers engaged in the work of cleaning out cuts between Dumfries and Galt on the line of a branch of the defendants' railway. A working train, consisting of a locomotive engine, tender, and eight flat cars, and a conductor's van, in charge of an engine driver, fireman, two brakemen and a conductor, was also engaged in the work. On the morning of the accident they were engaged in cleaning out a cut between Dumfries and a place called Orr's Lake, where there is a siding situate to the east of Dumfries and between it and Galt. There was also working on the same day between Orr's Lake and Galt a train known as a pile driver train. The conductor and engineer of the work train had received instructions to "protect" against two freight trains coming from the west and one train coming from the east, and also against the pile driver train. According to these instructions it was the duty of the conductor and engineer in charge of the train

to observe Rule 100 (c) of the defendants' rules, which directs that a train to be moved under protection to the next station in either direction must, "unless otherwise sufficiently protected," be preceded by a flagman at least 2,500 yards (50 telegraph poles) in advance, and be followed by a flagman at least 2,000 yards (40 telegraph poles) in rear, and these distances must be maintained. What was done by the conductor of the work train was to place one of his brakemen as a flagman at Dumfries, about 5 miles west of Galt, and the other as flagman at a point about 2 miles east of Galt and a short distance east of a place called Leslie. Apparently this arrangement was a sufficient protection against the trains from the west and east, but left no flagmen for protection against the pile driver train. The cars of the work train had been loaded at the cut near Orr's Lake, and had then proceeded with about 120 Italian labourers, with the deceased in charge, to Leslie, and there unloaded the cars. The train then backed down to Galt and entered a siding there, the conductor apparently intending to remain there until joined by his brakemen, or one of them, to act as flagman against the pile driver train. But in consequence, as he said, of the representations of the deceased that the delay would involve 120 men or so standing idle for some time, he changed his mind and determined to back the train down towards the cut at Orr's Lake, and gave his orders accordingly. He stood on top of the van; the deceased was in the cupola. He believed that, situated as they were on the rear of the train, which was moving backwards, they could keep a sufficient lookout for the pile driver train. It was the engine driver's duty to keep a lookout towards him and watch for signals every moment while his train was in motion; and the conductor testified that, situated as he was, he considered that he was just as good as a flagman if the engine driver had been watching what he was doing. He did not think it necessary to have a flagman, as they were moving slowly and the pile driver was moving slowly also. While proceeding at the rate of about eight miles an hour, as they approached a place called Blair's Crossing they observed the smoke of the pile driver train, and soon after saw the train at a distance of 13 telegraph poles, or about 650 yards.

The conductor made the usual signals with his arms to the engine driver to stop, but for some unexplained reason the latter took no notice, and although the signals were continued until the trains had almost come together, the engine was not stopped or the brakes applied. There were air brakes upon the first six flat cars, but none on the last two, and there was no connection of the air brakes with the van. But, with the appliances there were, the train could have been stopped in from 60 to 75 feet, so that there was ample time to have brought the train to a standstill and have avoided collision if the engineer had obeyed the conductor's signals. As it was, the trains came together, and the deceased and another man were killed.

At the close of the plaintiff's case, and again when all the evidence had been given, counsel for the defendants moved for a nonsuit, basing his motion chiefly on the ground that the deceased had been guilty of a breach of the defendants' rules with regard to protection against other trains. No defence of this kind was on the record, nor was contributory negligence set up. The learned Judge offered to allow the latter defence to be set up on terms which the defendants' counsel did not accept.

The learned trial Judge submitted to the jury questions which were answered as follows:—

"1. Were the defendants guilty of any negligence that caused the accident? A. Yes.

"2. If so, state what the negligence was? A. The company not having the train thoroughly equipped with air brakes and flagmen.

"3. Did the deceased, Samuel Edward Muma, receive the injuries of which he died, by reason of the negligence of any person in the service of the defendants who had the charge or control of any locomotive engine or train upon the defendants' railway? A. Yes.

"4. If so, name the person or persons and state what the negligence was? A. The conductor, by disobeying order and moving train, and engineer not receiving signal.

"5. At what sum do you assess the damages—(a) at common

law? A. \$3,500. (b) under the Workmen's Compensation Act? A. \$2,100.

"6. Apportion the damages between the widow and children—
(a) At common law? A. Widow \$2,000; the children \$300 each.
(b) Under the Act. A. \$1,400 for children; widow \$2,100.

[N.B.—It would seem that the jury here meant to say \$700 instead of \$2,100.] Matthew Edward Muma, 10 years, \$200; Gladys Eugene Muma, 8 years, \$300; Henry Nathan Muma, 6 years, \$300; Florence Mary Muma, 4 years, \$300; Frankland Harold Muma, 2 years, \$300.

Upon these answers the learned trial Judge entered judgment for \$3,500, apportioned as specified by the jury.

On the appeal it was contended for the defendants that the plaintiff could not recover in either aspect of the case, because it was said the evidence adduced on behalf of the plaintiff shewed that the cause of the accident was the deceased's disobedience of the defendants' rules, and that he was thus the author of his own death.

The rule in question—100 (c)—is one of a group of rules under the heading of "movement of trains," which are plainly intended to govern the conduct of the conductor, engineer and train hands. They are for the guidance of persons in charge of the train and its movements, and the deceased was not one of these. He was in charge of the men who loaded and unloaded the train, and, as incident to their employment, rode on it backwards and forwards to and from the cut and dump. He could not interfere with the management of the train, or give directions to the conductor or engine driver as to the conduct of it. He might perhaps direct where it should be placed for the purpose of being loaded or unloaded, but he had no control over the actions of the persons whose duty it was to manage the movements of the engine and cars. The conductor and engineer were the persons responsible for the movements and safety of the train, and not the deceased: See Rule 105. He could not have compelled the conductor or engineer to move the train, nor have authorized or required them to disregard or overlook their instructions or orders from the persons whose duty it was to give them directions with regard to the movements and

protection of the train. His representations or persuasions, dictated no doubt by a zealous desire to save for the defendants the time of the 120 employees who were kept idle by reason of the conductor's disposition of his brakemen, were not a breach of the rule. The power to act was with the conductor and engineer, and it was their action which constituted a breach of the rule, if breach of the rule there was.

The case is not at all like *Deyo v. Kingston and Pembroke R.W. Co.*, 8 O.L.R. 588, and other cases which were cited on this branch of the case, for in these cases the act of the employee was one against which there was an express prohibition which extended to him, or it was a gross neglect of some rule which extended to his employment and to which it was his duty to conform.

In this case it is not open to the defendants to contend, as they did in argument, that the deceased was guilty of contributory negligence, for even if what he did could be said to be of that nature, the defence was not set up, and there is no finding of the jury upon it. Neither is the argument that the deceased voluntarily assumed the risk of accident resulting from the conductor and engineer's breach of the rule, for the defendants have not obtained a finding of the jury to that effect: *Williams v. Birmingham Battery and Metal Co.*, [1899] 2 Q.B. 338.

But whether or not the action of the conductor and engineer in going out under the circumstances should be considered a disobedience by the deceased of the rule is not material, for it was not the cause of the accident. The rule requires the placing of the flagmen where indicated unless the train is otherwise sufficiently protected. According to the conductor's evidence he considered the train sufficiently protected by the means he took to guard against the pile driver train. And if the engineer had done his duty the accident would not have happened. The real cause of the accident was the negligence of the engineer in not keeping on the lookout for and obeying the conductor's signals. At the rate at which the trains were moving, at the distance they were apart when the conductor signalled the engine driver, and with the means at the engine driver's command to stop the train within 60 or 75

feet, there was ample time and opportunity to have avoided the collision. The engine driver, who was not called as a witness, was undoubtedly neglecting his duty and thus brought about the accident; and the finding of the jury to this effect is well supported by the evidence.

This is sufficient to render the defendants liable to the plaintiff. But there remains the question whether the plaintiff is entitled to retain the judgment entered in her favour; in other words, whether the defendants are liable at common law or only under the Workmen's Compensation Act.

The claim of liability at common law is rested on alleged negligence on the part of the defendants in not providing sufficient air brakes or appliances to properly control or stop the train, and in not providing a sufficient number of train hands. The jury have found that the defendants were negligent in not having the train thoroughly equipped with air brakes and flagmen. But not only are these findings contrary to the evidence, but there is really no evidence on which the jury could reasonably make them. All the evidence goes to shew that the air brake appliances with which the train was provided were quite sufficient to have controlled it and brought it to a standstill within a very short distance. It was said that if there had been a connection through to the conductor's van the air brakes might have been operated from it and the train stopped in that way. The evidence also shews, however, that this method of applying the brakes is not unattended by danger, and it is very seldom put into practice. It may result in "buckling" the cars, a very serious thing in the case of flat cars crowded with workmen. Section 211 (b) (I.) (II.) of the Railway Act (1903) requires that on all trains carrying passengers the brakes shall be continuous, and must be instantaneous in action and capable of being applied at will by the engine driver or any brakemen, and the brake must be self-applying in the event of any failure in the certainty of its action.

Looking at all the provisions of the section, it seems apparent that a work train, such as that in question here, is not of the class referred to in the sub-sections quoted.

Work trains of this description cannot be considered either passenger trains or trains carrying passengers, as these trains are generally understood.

And as to the work train in question, the evidence shews that the defendants sent it out equipped as sufficiently as regards brakes and appliances as is usual or customary, and that no injury resulted from any lack in this respect. The same is the case with respect to the number of men in charge. The crew was quite sufficient for the proper handling of the train. It may be that the disposition of them made by the conductor was not a proper one, but for that the defendants would not be blameable. If negligence at all, that would be negligence of the conductor. But again, the want of the brakemen or flagmen was not the cause of the accident. A flagman sent to the rear of the work train could not have done more than signal the engine driver to stop. This was done by the conductor at a time and distance amply sufficient to have enabled the engine driver to stop the train and avoid the collision.

So the case comes back to the negligence of the engine driver as found by the jury in their answers to the third and fourth questions. The plaintiff therefore can recover only under the Workmen's Compensation Act, and at the trial judgment should have been entered for the \$2,100 damages found against the defendants under that head. The defendants paid into Court \$2,102.03.

The judgment entered at the trial should be set aside, and instead judgment should be entered in favour of the plaintiff for \$2,100, apportioned in the ratio fixed by the jury.

In this view of the case the question as to the insurance money paid to the plaintiff does not arise.

The plaintiff to have costs up to and inclusive of the delivery of the defence. The defendants to set off their costs up to and inclusive of the trial. There will be no costs of the appeal to either party.

GARROW and MACLAREN, JJ.A., concurred.

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—
STREET RAILWAY.

ONTARIO.]

[COURT OF APPEAL.

WALLINGFORD V. OTTAWA ELECTRIC R.W. CO.

(14 O.L.R. 383.)

Street Railways—Injury to Passenger Alighting from Car—Negligence—Contributory Negligence—Crossing behind Car—Collision with Car on Parallel Track—Duty to Sound Gong—Regulations—"Crossing"—Case for Jury—Costs—Discretion—Appeal.

The plaintiff was a passenger on a car of the defendants, and stepped from it while it was in motion, as it reached a street crossing; the motorman had been signalled to stop, but failed to do so. The plaintiff alighted safely, but found himself in front of a horse and cab driven swiftly towards him. In order to avoid a collision with the horse, and also in order to cross to the west side of the street, the plaintiff turned behind the car he had just left and passed on towards the other track; as he reached it, he became aware of a car coming towards him at a rapid rate, and to avoid being run down he flung himself on the fender, thus saving his life, but he was seriously injured. In an action to recover damages for his injuries he was a witness at the trial, and said that it was impossible to get out of the way of the car; he did not hear the gong sound, although if it had been rung he would have heard it. By one of the regulations forming part of the agreement between the city corporation and the defendants, validated by 57 Vict. ch. 76 (O.), under which the defendants operated their cars on the city's highways, it was provided that each car was to be supplied with a gong, to be sounded by the driver when the car approached to within 50 feet of each crossing. This was not brought to the attention of the Judge at the trial. The plaintiff, however, was aware that it was the usual practice to sound the gong at crossings, and he expected it to be done when a car was approaching a crossing:—

Held, that, even if the regulation had not the force of a statutory requirement, the proof of failure to comply with a precaution which the defendants had recognized as important for the safety of persons using the crossing on streets occupied by the railway, was evidence for the jury of negligence in the conduct of the car; and the question whether the gong was sounded was for the jury.

Semble, per Moss, C.J.O., that the term "crossing" in the agreement, is intended to indicate any place on or along the streets occupied by the railway where there is a walk laid for the purpose of enabling foot passengers to cross from one side of the street to another, and where the cars would stop to take up or let down passengers; and is not confined to the crossing of an intersecting street.

The Court declined to interfere with the discretion of the Court below in withholding costs from the plaintiff, in setting aside a nonsuit and granting a new trial.

Order of a Divisional Court affirmed.

THE following statement of facts is taken from the judgment of Moss, C.J.O.:—

Appeal by the defendants from a judgment of a Divisional Court setting aside the judgment entered at the trial by Teetzel, J., who, at the close of the plaintiff's case, withdrew it from the jury, and dismissed the action. There is also a cross-appeal by the plaintiff against the part of the judgment of the Divisional Court that deals with the costs of the former trial and of the appeal.

The action is to recover damages for injuries sustained by the plaintiff in consequence of being struck by an electric car which was being operated on the defendants' line of railway in the city of Ottawa. He was a passenger on a car proceeding in a northerly direction along Sussex street, on the easterly side of the roadway, and was desirous of alighting at the junction of Sussex street with Redpath street, which enters Sussex street from the east, but does not intersect it.

On nearing the crossing over Sussex street from the junction of the south side of Redpath street with the east side of Sussex street, he signalled the conductor, who rang the bell to warn the motorman to stop the car. The crossing is one at which the cars ordinarily stop in the usual course to permit persons to enter or alight, and there is a plank walk from the junction across Sussex street to the sidewalk on the west.

The speed of the car was slackened, apparently in obedience to the conductor's signal. As it neared the crossing, the plaintiff stepped upon the rear platform, prepared to alight, when the car came to a standstill. But before it had done so, or the plaintiff had alighted, the conductor rang the bell to proceed, and the movement of the car was quickened. By this time the front end had reached the crossing, and, as it was evident it was not going to be drawn up, the plaintiff stepped or jumped from the platform or step. He alighted safely, but found himself in front of a cab, with one horse, which was being driven swiftly towards him from the north along Sussex street. In order to avoid a collision with the horse, and also in order to cross to the west side of Sussex street, to which he was bound, the plaintiff turned behind the car he had just left, and passed on towards the other track. As he reached it, he became aware of a car coming towards him at a rapid rate.

To avoid being run down, he flung himself on the fender, thus saving his life, but he was seriously injured. He said it was impossible to get out of the way of the car, it was coming so fast, without ringing the bell or gong; he had the start, and could not hold himself, so it occurred to him the best thing he could do was to throw himself on the fender.

He said he did not hear the gong sound, although if it had been rung he would have heard it. By one of the regulations forming part of the agreement between the city of Ottawa and the defendants under which they operate their system on the city highways, it is provided that each car is to be supplied with a gong, which shall be sounded by the driver when the car approaches to within 50 feet of each crossing, but, unfortunately, the attention of the learned trial Judge was not drawn to it or some of the other regulations, which seem to impose duties on the defendants with respect to persons being on or crossing the streets of the city. It is, however, to be gathered from the plaintiff's testimony that he was aware that it was the usual practice to sound the gong at crossings, and he expected it to be done when a car was approaching a crossing.

The learned Judge was of opinion that there was absence of proof that it was the defendants' duty to sound a gong, or that omitting to sound it caused the injury, and that the evidence shewed that the plaintiff was injudicious and careless, and was himself guilty of grave negligence in stepping on the track without taking the precaution of looking to see if a car was approaching. And he withdrew the case from the jury.

Upon appeal the Divisional Court reversed the judgment, being of opinion that, having regard to the plaintiff's statements, the jury might reasonably come to the conclusion that he was aware of the rule with regard to the sounding of the gong and relied on it, and that if the gong had sounded, the plaintiff would have been warned, and might not have got himself into a position of danger; in short, that it was a question for the jury to say whether he had acted in a reasonable manner under all the circumstances; and a new trial was directed.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A., on the 24th January, 1907.

H. S. Osler, K.C., for the defendants. There is no evidence of negligence on the part of the defendants. The evidence of the plaintiff himself and the witnesses called on his behalf clearly shews that the accident was wholly occasioned by the negligence of the plaintiff in endeavouring to cross Sussex street in front of the car of the defendants, and without exercising any care or caution to look out for the approach of the car by which he was struck. Upon the evidence adduced a jury could not reasonably find a verdict in favour of the plaintiff. The suggestion is that the bell should be ringing. There was some evidence that it was not ringing. The defendants' statute was not referred to at the trial. It is 57 Vict. ch. 76 (O.), and the schedule, at p. 347 of the statutes of 1894, regulation 5, shews that the car is to be supplied with a gong, which is to be sounded at 50 feet from the crossing. At best there is no obligation to ring when meeting another car—there was no obligation at the time the plaintiff got in front. The regulation is not applicable to such a crossing as the one the car was approaching. No facts are in dispute in the evidence. The plaintiff did not look; he had heard the rumbling of the approaching car, but thought it something else. The following cases shew there is no liability: *Gallinger v. Toronto R.W. Co.* (1904), 8 O.L.R. 698; *Danger v. London Street R.W. Co.* (1899), 30 O.R. 493; *Robinson v. Toronto R.W. Co.* (1901), 2 O.L.R. 18; *O'Hearn v. Town of Port Arthur* (1902), 4 O.L.R. 209. *Preston v. Toronto R.W. Co.* (1906), 11 O.L.R. 56, 13 O.L.R. 369, is a different case from this. [Discussion of that case.]

J. A. Ritchie, for the plaintiff. This is a stronger case for the plaintiff than the *Preston* case. Apart from the rule, there is a duty to sound the gong, but there was the rule. *Peart v. Grand Trunk R.W. Co.* (1886), 10 O.L.R. 753 (Appx.), decided by the Privy Council, is at variance with the cases relied on by the defendants. Not to look is not contributory negligence. The case is for the jury. I refer to *Valleè v. Grand Trunk R.W. Co.* (1901), 1 O.L.R. 224; *Morrow v. Canadian Pacific R.W. Co.* (1894), 21

A.R. 149; *Champaign v. Grand Trunk R.W. Co.* (1905), 9 O.L.R. 589; *Smith v. Niagara and St. Catharines R.W. Co.* (1904), 9 O.L.R. 158; *Randall v. Ahearn and Soper* (1904), 34 S.C.R. 698; *London and Western Trusts Co. v. Lake Erie and Detroit River R.W. Co.* (1906), 12 O.L.R. 28; *Sims v. Grand Trunk R.W. Co.* (1905-6), 10 O.L.R. 330, 12 O.L.R. 39. The plaintiff should have the costs of the former trial and of the motion to the Divisional Court. The mere absence of a reference at the trial to the statute should not deprive the plaintiff of costs. The defendants should have cited the statute. The Divisional Court misapprehended the circumstances.

Osler, in reply.

March 14, 1907. Moss, C.J.O.:—In view of all the evidence, the conclusion of the Divisional Court appears to be right. It was, of course, unfortunate that the learned trial Judge was not made aware of the regulations above referred to. In order to do so, it was only necessary to cite to him the Act 57 Vict. ch. 76 (O.), by which the agreement with the city is validated. Even if, as intimated by the Divisional Court, the regulation has not the form of a statutory requirement, yet the proof of failure to comply with a precaution which the defendants have recognized as important for the safety of persons using the crossings on streets occupied by the railway is evidence for the jury of negligence in the conduct of the car.

In its circumstances the case presents many features similar to those in *Winnipeg Electric Street R.W. Co. v. Bell* (1906), 37 S.C.R. 515, and *Montreal Street R.W. Co. v. Deslongchamps* (1906), 37 S.C.R. 685.

It was argued for the defendants that the regulation was not applicable to such a crossing as the one in question, inasmuch as Redpath street does not extend to the west of Sussex street. It is true that Redpath street does not cross Sussex street in the sense of intersecting it. But there is a plank walk crossing Sussex street from the junction of Redpath street, used by foot passengers for going across the street, and at which the defendants' cars stop

when there are passengers to take up or let down. And there are several expressions in the regulations which shew the meaning the parties to the agreement attached to the word "crossing" as there used. For example, regulation No. 4 provides that should there be any foot passengers on any crossing before the car approaches the same, the car shall be stopped so as to permit such passengers to cross.

No. 7 provides that no car shall be allowed to stop on or over a crossing "or in front of any intersecting street."

And No. 8 refers to intersection of streets. There is enough in the references in the agreement to shew that the term "crossing," as therein employed, was intended to indicate any place on or along the street occupied by the railway where there is a walk laid for the purpose of enabling foot passengers to cross from one side of the street to the other, and where the cars would stop to take up or let down passengers.

See also *Brenner v. Toronto R.W. Co.* (1907), 13 O.L.R. 423, where the subject is dealt with at p. 429.

The question whether the gong was sounded in proper compliance with the regulations bearing on the duty of persons in charge of cars when approaching or at crossings will be for the jury.

The appeal fails, and must be dismissed.

With regard to the cross-appeal, the matter of the costs was within the discretion of the Divisional Court, and that discretion is not to be lightly interfered with under any circumstances: see *Beatty v. McConnell* (1906), 8 O.W.R. 916. In this case it cannot be said that the discretion was wrongly exercised, and the cross-appeal must be dismissed.

MEREDITH, J.A.:—This is not one of those cases in which it can be said that the plaintiff must have been guilty of negligence causing, or contributing to the cause of, his injury: that, if he did not look, he was negligent, and if he did look, and failed to see and avoid the danger, he was likewise negligent. There were intervening circumstances of a more or less distracting character. On alighting from the car he was confronted, and put in some danger,

by the horse and carriage moving towards him. In escaping from the more apparent, though lesser, danger, he ran into, and suffered from, the greater one. It is a well-accepted principle that one in imminent danger, and obliged to act in haste, is not necessarily to be blamed if he take the less safe way out of it. The question was one for the jury. It cannot be said that contributory negligence, or that negligence causing the accident, on the part of the plaintiff, was so clearly proved that no reasonable jury, acting honestly, could find otherwise. On the other hand, if the jury had found the plaintiff guilty of contributory negligence, or even of negligence which was the proximate cause of the injury, there would likewise be no good ground for the Court's interference, on the evidence as it now stands. Nor can it be said that there was no evidence of negligence on the part of the defendants causing the plaintiff's injury. It was at least a question for the jury whether the gong of the car which struck the plaintiff ought to have been, and was, sounded. Looking at the whole circumstances of the case, including the defendants' agreement upon the subject, it cannot be said that there was no evidence of any duty the defendants owed to the plaintiff in that respect.

The appeal must be dismissed.

And so, too, should the cross-appeal. If there be any right of appeal upon that question, the plaintiff at least has no good cause for complaint upon that score. A mistrial is not unlikely where the plaintiff fails to prove a most important part of his case. The subject is one which, perhaps, the plaintiff had better have left alone.

OSLER, GARROW, and MACLAREN, JJ.A., concurred.

NEGLIGENCE—HAND-CAR—WARNING.

[ANGLIN, J.
[DIVISIONAL COURT.

ONTARIO.]

BURTCH V. THE CANADIAN PACIFIC R.W. CO.

(13 O.L.R. 632.)

Railways—Crossing in Town—Hand-car—Warning—Finding of Jury—Railway Commission Jurisdiction—Infant Plaintiff—Negligence—Contributory Negligence—By-law Against Coasting.

A child of ten years of age was coasting down an incline on a street in a town crossed by a railway, and was run down and injured by a hand-car proceeding along the railway.

At the trial, the jury found in answer to questions, that the defendants were negligent in not giving some warning in approaching the crossing; that the defendants could have avoided injuring the plaintiff by stopping the hand-car, and that it was their duty, apart from the provisions of the Railway Act, to have given warning:—

Held, that the jury, in finding that warning should have been given, were not assuming to lay down any general rule as to what care or precaution should be taken, but simply that under the circumstances some warning should have been given, and that the answer was unobjectionable and in no way infringed upon the jurisdiction of the Railway Commission.

Held also, that even if a hand-car is not a train, a warning is necessary apart from the Railway Act.

Held also, that although there was a municipal by-law prohibiting coasting, the plaintiff had not been notified as required by the by-law, and the onus was on the defendants to prove criminal capacity at common law and under the Code of an infant under fourteen, and the defendants were not entitled to invoke such by-law for another purpose.

Held lastly, that although a defendant is not liable if the injury is caused entirely by an infant's own negligence, the capacity of the infant to be guilty of contributory negligence is a question for the jury, and that as the plaintiff was not a trespasser and was where he had a right to be, and had not been notified under the provisions of the by-law, or his capacity for crime shown, the whole case was properly submitted to the jury.

THIS was an appeal by the defendants from the judgment at the trial in an action for damages for injuries caused by a passing hand-car to an infant, who was coasting down an incline and across the defendants' railway running through the town of Orangeville.

The action was tried at Orangeville on the 18th of April, 1906, before ANGLIN, J., with a jury.

I. B. Lucas and W. J. L. McKay, for the plaintiff.

Shirley Denison for the defendants.

The following facts are taken from the judgment of Clute. J., in the Divisional Court:—

The defendants' railway passes through the town of Orangeville, crossing John street in the said town. The infant plaintiff, on the 29th September, 1905, while on an errand upon said street, and while passing the point where the said railway crosses the same, was run down by a hand-car, then used by the employees of the defendant company, and was seriously injured, owing, as it is alleged, to the negligence of the defendants.

The evidence shewed that the infant plaintiff had stopped on the road to play with other boys after having delivered certain parcels with which he was sent, and that he was coasting down the incline on John street in his little express waggon when the accident occurred. He was sitting in front steering the waggon, and another boy was behind facing the opposite direction.

Questions were submitted to the jury and answered as follows:—

1. Q. Were the defendants guilty of any negligence which caused the injuries sustained by the plaintiff? A. Yes.

2. Q. If so, in what did such negligence consist? A. The negligence consisted in having a close board fence along the west side of street running south from the railway to south of railway limit, also the bank running west along the south side of track, also shrubbery and weeds growing along the wire fence. We consider it negligent in not giving some warning in approaching a crossing such as John street.

3. Q. Did the plaintiff omit to take any reasonable care, which he should have taken, and which, if taken would have prevented the occurrence in question? A. No.

4. Q. If so, what such care did he omit to take?

5. Q. Could the defendants, after the plaintiff's danger became or should have been apparent, have avoided injuring the plaintiff? A. Yes, after it should have been apparent.

6. Q. If so, what could they have done which they did not do? A. We think they could have stopped the car.

7. Q. At what sum do you assess plaintiff's damages? A. \$1,000.

Supplemental question. Was it the duty of the defendants, apart from the requirement of sec. 228 of the Railway Act, to have warned the plaintiff of the approach of the hand-car which struck his cart? A. Yes.

April 19, 1906. ANGLIN, J.:—After considering the judgment of the Supreme Court in *The Lake Erie and Detroit River R.W. Co. v. Barclay* (1900), 30 S.C.R. 360, I have concluded that the motion for non-suit made on behalf of the defendants at the close of the plaintiff's case cannot succeed.

There was evidence here from which it might properly be inferred by the jury, that the crossing upon which the plaintiff was injured was of a particularly dangerous character.

He was injured, not by an engine and train, to which the requirements of blowing the whistle and sounding the bell have application. No provision appears to be made in the Railway Act prescribing any means of warning or of safe-guarding the lives of persons using highway crossings where the railway is operating, not a regular train of cars, but a hand-car or lorry, such as was used in this case, unless sec. 228 of the Act applies to such a car.

If sec. 228 does apply, there was evidence of a failure to comply with its requirements. If that section does not apply, then the question is at large, as to what precautions a railway company should be required to take to safe-guard the lives of persons using the highway under circumstances such as we have here.

A hand-car coming down grade, even at a comparatively high rate of speed, makes very little noise as compared with the noise which an engine and train would make, yet the engine and train is required to give warning of its approach by sounding the bell and whistle. In circumstances, therefore, such as we have here—circumstances of peculiar danger, having regard to the nature of the crossing, and to the use made of the hand-car—I think it must properly be left to the jury, if sec. 228 does not apply, to determine what precautions, if any, the railway company should be required to take for the protection of the lives and limbs of persons crossing, or about to cross, the highway. As that question must go to the

jury, and as in this case it has been submitted to the jury, and the jury have found an obligation to give some warning, which was not given, it follows, that there must be judgment upon the findings in favour of the plaintiff for the damages awarded, the sum of one thousand dollars, and I shall give judgment accordingly.

From this judgment the defendants appealed to a Divisional Court, and the appeal was argued on the 26th and 27th of September, 1906, before FALCONBRIDGE, C.J.K.B., BRITTON and CLUTE, JJ.

H. S. Osler, K.C., for the appeal. The child had no right to be where he was and had no right to play on the streets or to coast down the incline; in fact, there was a municipal by-law enacted against such coasting. He was really a trespasser: *Regina v. Justin* (1893), 24 O.R. 327; *Patterson v. Fanning* (1901), 2 O.L.R. 462. *Ricketts v. The Corporation of the Village of Markdale* (1900), 31 O.R. 610, is a somewhat similar case, but there, there was an allurement, and that decision was doubted in *Farrell v. Grand Trunk R.W. Co.* (1903), 2 Can. Ry. Cas. 249. The hand-car was not a train; nothing was being drawn. No warning was prescribed. It was not open to the jury to find that the railway company should take any special precaution in any special case. In doing so, they were usurping the functions of the Railway Commission: *The Grand Trunk Railway Company of Canada v. McKay* (1903), 34 S.C.R. 81, *per* Sedgewick, J., at pp. 88 and 89; *per* Davies, J., at p. 97; *The Grand Trunk Railway Company of Canada v. Hainer* (1905), 36 S.C.R. 180; *Gorris v. Scott* (1874), L.R. 9 Ex. 125.

W. J. L. McKay, contra. The plaintiff has satisfied the onus of proof in every respect. The jury have merely found negligence on the part of the defendants, which they had the right to do. The defendants, without any statutory obligation, were guilty of negligence in not giving warning as they were running across a travelled street in a town. In order to escape liability, the defendants must shew that the accident was wholly attributable to the infant's

negligence, and they have not done this. I refer to Smith on Negligence, Bl. ed., pp. 14 and 160; *Champaigne v. The Grand Trunk R.W. Co.* (1905), 9 O.L.R. 589; *The Grand Trunk R.W. Co. v. McKay* (1904), 3 Can. Ry. Cas. 52; *Thompson v. The Great Western R.W. Co.* (1874), 24 U.C.C.P. 429; *Smith v. The London and South Western R.W. Co.* (1870), L.R. 6 C.P. 14; *Bilbee v. The London, Brighton and South Coast R.W. Co.* (1865), 34 L.J.C.P. 182. The jury may assume facts from common knowledge, and the view of a jury is an original source of evidence: *Thompson v. The Great Western R.W. Co.* (1874), 24 U.C.C.P. 429; Wigmore on Evidence, Can. ed., pars. 1168 and 2570, and notes; *Beckett v. The Grand Trunk R.W. Co.* (1886), 13 A.R. 174, *per Osler, J.A.*, at p. 206. Even though the plaintiff was committing a breach of the by-law at the time of the accident, he can recover: *Steele v. Burkhardt* (1870), 104 Mass. 59; and capacity of an infant to commit crime must be shewn: Russell on Crimes, 6th ed., p. 113 *et seq.* I refer also to *Hollinger v. Canadian Pacific R.W. Co.* (1893), 20 A.R. 244; *Cox v. The Great Western R.W. Co.* (1882), L.R. 9 Q.B.D. 106; *The Lake Erie and Detroit River R.W. Co. v. Barclay* (1900), 30 S.C.R. 360; *Lynch v. Nurdin* (1841), 1 Q.B. 29.

Osler, in reply, cited *Makins v. Piggott* (1898), 29 S.C.R. 188; *McShane v. The Toronto, Hamilton and Buffalo R.W. Co.* (1899), 31 O.R. 185; *The New Brunswick R.W. Co. v. Vanwart* (1889), 17 S.C.R. 35.

December 15, 1906. BRITTON, J.:—The facts are fully set out in the judgment of my brother Clute, which I have had the privilege of perusing.

The damages are large, but hardly so excessive as to warrant a new trial on that ground.

The jury acquitted the plaintiff of any contributory negligence, and answered the first, second and supplemental questions by finding the defendants guilty of negligence, which caused the injury sustained by the plaintiff. The answer, "We consider it negligent in not giving some warning in approaching a crossing such as John street," must, when considered in the light of the Judge's

charge, be taken as a finding that no warning was in fact given by those on the hand-car of the approach of that car to the crossing.

Then the jury expressly found that it was the duty of the defendants, apart from the requirement of sec. 228 of the Dominion Railway Act of 1903, to have warned the plaintiff—that is to say, to have warned persons upon or near the crossing of the approach of the hand-car.

There was evidence which would permit such a finding. I do not see any difference in principle, upon the point involving negligence and liability, between this case and that of a servant upon his master's business driving along an ordinary highway and colliding with a vehicle or person upon a cross-road.

The hand-car was lawfully upon defendants' railway. The plaintiff was lawfully upon John street. The plaintiff was run down by the hand-car and the jury say the plaintiff was not to blame, but the defendants were to blame, and that the blame or negligence was in approaching such a crossing as this was in a hand-car as driven, without giving such warning as would enable a person on the highway and near to the track, exercising ordinary care, to avoid the danger of being run down.

What warning should be given must depend upon the facts and circumstances in each case, and if from any cause it would be difficult for a person at or near the crossing—he not being to blame for, or creating the difficulty—to see or hear an approaching hand-car, there would be necessity for care on the part of the persons in charge of the car.

I am of opinion that there was no evidence to go to the jury upon the question of negligence of the defendants as to the fences, or as to the excessive speed of the hand-car.

I am further of the opinion that there was not evidence upon which the jury could be asked to find “that the defendants, after the plaintiff's danger should have been apparent, could have avoided injuring the plaintiff,” and even if the defendants could have avoided the accident after the danger “should have become apparent,” that does not necessarily amount to a finding of negligence which was the cause of the accident, or to a fixing of liability.

In *The Lake Erie and Detroit River R.W. Co. v. Barclay*, 30 S.C.R. 360, it was held that "it was properly left to the jury to determine whether or not, in this particular case where . . . , there being no engine connected with the train colliding with the carriage, and none of the usual signals, such as the blowing of whistles or the ringing of bells, to give warning to passers-by, it was not necessary, at that particular time and under those particular circumstances, to take greater precautions than they really did take, and to be much more careful than in ordinary cases where these conditions did not exist:" *per* Sedgewick, J., at p. 364.

In the present case, the physical condition of land, fences, weeds, shrubs, etc., near to the crossing where the accident happened, had to be taken into consideration in determining what those operating the hand-car should do in approaching such a crossing.

I think the question involving negligence on the part of the defendants in not giving some warning of the approach of the hand-car was a proper one, and I cannot say that the jury should not have found as they did.

The appeal should be dismissed with costs.

CLUTE, J. (after setting out the facts and questions and answers as above):—It was submitted on behalf of the defendants that there was no evidence on the part of the plaintiff rendering them liable for the accident which happened; and in support of this contention it was strenuously urged that, to hold the railway bound to give notice of the passing of a hand-car under circumstances such as the present, would be for the jury to assume the function of the Railway Commission; that a railway using a hand-car in the ordinary manner and having no obligation imposed upon them by the statute with reference to signals or notice, were not bound to give notice, and for the jury to find that their neglect in so doing was negligence was beyond their competency under the circumstances in this case.

A somewhat similar point was involved in *The Lake Erie and Detroit River R.W. Co. v. Barclay*, 30 S.C.R. 360. In that case the

jury found that the railway company was guilty of negligence, and that a man should have been on the crossing when making the switch, to warn the public. This finding was supported in the Court of Appeal and affirmed in the Supreme Court, where it was held that the case did not raise the question of the jury's right to determine whether or not the railway company can be compelled to place a watchman upon a level highway crossing to warn persons about to cross the line. So here, the jury do not assume to lay down any general rule, as to what care or precaution should be taken. They simply find, that, having regard to the condition of the approach to this crossing on the defendants' railway and the circumstances of this case, some warning should have been given.

The answer, I think, was unobjectionable. It simply disposed of a case having regard to certain special circumstances. I think there was evidence to support the finding, and under the authority of the above case, that the findings of the jury in no way infringed upon the jurisdiction of the Railway Commission.

The Grand Trunk R.W. Co. of Canada v. McKay, 34 S.C.R. 81, was relied upon by counsel in support of his contention, but that case, in my judgment, does not conflict with the case just referred to. The *McKay* case simply decided that, in passing through a thickly peopled portion of a town or village, a railway train is not limited to a maximum speed of six miles an hour, so long as the railway fences on both sides of the track are maintained and turned into cattle guards at highway crossings. Sedgewick, J., points out that "no person has a right to prevent any other person from driving his horse or from himself going up to within a foot of a passing train; and certainly no one has the right to prevent any one going upon that part of the highway which is opposite to the unoccupied portion of the railway grounds. If the railway company without express statutory authority were to erect gates opposite to its side fences, and lower those gates at any time, any person prevented from driving or walking towards the line of rails by such gates would be interfered with in his legal common rights. It must be apparent, then, that there must be some authority given to a railway company before it can assume to erect gates

upon a highway. This authority is to be found in the Railway Act," etc.

But it is said, that the judgment of Davies, J., at p. 97, shews that Parliament by sec. 187 of the Railway Act vested in the Railway Committee, now the Railway Commission, the exclusive power and duty to determine the character and extent of the protection which should be given to the public at places where the railway track crosses the highway at rail level. That section reads as follows: "And the Railway Committee, if it appears to it expedient or necessary for the public safety, may, from time to time, with the sanction of the Governor-in-Council, authorize or require the company to which such railway belongs, within such time as the said committee directs, to protect such street or highway by a watchman or by a watchman and gates or other protection." Having regard to the purview of the section and what is said by Davies, J., I think it clear that it has no application to the present case.

This is not the case of affording protection as indicated in that section, but whether or not, having regard to the peculiar circumstances of the case, notice should have been given by the passing hand-car of its approach. Having regard to the interpretation clauses of the Railway Act of 1903 (D.), ch. 58, sec. 2, sub-sec. (*a.a.*), and sec. 228, the argument at first glance seems to be complete that the hand-car is a "train" within the meaning of the Act, and that warning should be given under that section.

Mr. Osler sought to get rid of the logical effect of the interpretation clauses of this section as imposing such duty, by urging that sec. 228 so manifestly had reference to an ordinary train, that it was manifest the context required a more limited meaning to the word "train" than would be otherwise indicated by the interpretation clauses. I am of opinion that this is so, and that the above clauses of the Act do not help the plaintiff. There was, however, evidence of negligence in not giving warning, which, in my judgment, was proper to go to the jury.

The further question remains, as to whether the infant plaintiff

has not precluded himself from recovering in this action by his own conduct.

The question of contributory negligence is for the jury. The defendants must, therefore, go further and shew that there was no evidence on the part of the plaintiff to submit to the jury. In other words, that his conduct by his own admission is such as to shew that he was the cause of his own injury. He was properly upon the street. The fact that he was playing on the street would not necessarily prevent his recovering, if he were injured by the defendants' negligence: *Ricketts v. The Corporation of the Village of Markdale*, 31 O.R. 180, 610.

It is said in *Farrell v. Grand Trunk R.W. Co.*, 2 Can. Ry. Cas. 250, that the *Ricketts* case was cited and doubted by some of the members of the Court; but it has not, so far as I know, been overruled. The Chancellor, in the *Ricketts* case, p. 615, after reviewing the English authorities, and pointing out that the English highway is the outcome of dedication by private proprietors, who still remain owners of the soil, subject to the right to easement, with the mere right to pass and re-pass, reached the conclusion that children may play on the highway when there is no prohibitory legal law and where their presence is not prejudicial to the ordinary use of the street for passage and traffic, quoting *McGarry v. Loomis* (1875), 63 N.Y. Rep. 108, where Church, C.J., said: "That it is not unlawful, wrongful, or negligent for children on the highway to play, is a proposition which is too plain for comment."

Reference was made to the by-law No. 366, entitled a by-law to prevent children riding behind waggons, etc., etc. The by-law contains a number of provisions, one of which is that "no person shall coast on a hand-sleigh or sleigh, or toboggan or other device, on any street or sidewalk, within the municipality of Orangeville. That it shall be the duty of the chief constable to notify any child or person doing so of the consequences of violating this by-law, and after a second offence, to summon and to bring such child or person before the magistrate."

Murray defines "coasting" to mean "the winter's sport of sliding on a sled down hill," and hence the action of shooting down hill

on a bicycle or tricycle. Here, the by-law uses the words "other device," and having regard to the popular meaning of "coasting" and the expression of the by-law, I am of opinion that the by-law is sufficiently broad to apply to the present case.

There was, however, no evidence that the plaintiff had been warned, and it does not appear to be an offence punishable under the by-law until he is warned, although it is something which the town desired to prohibit in the manner indicated. But I do not think the defendants are entitled to avail themselves of the by-law as an answer to the plaintiff's claim. It was probably admissible as evidence for what it was worth, as shewing the action of the municipality in regard to the rights of children playing upon the street. But it was manifestly passed to prevent sport of that kind from interfering with the ordinary use of the street, and I do not think a by-law passed for that purpose can be invoked by the railway company for another purpose. Reference may be had to *Gorris v. Scott*, L.R. 9 Ex. 125, as bearing upon this question. There, it was held that where the statute creates a duty with the object of preventing a mischief of a particular kind, a person who, by reason of another neglect of the statutory duty, suffers a loss of a different kind, is not entitled to maintain an action in respect of such loss. Though the statute relied upon and the facts in that case are entirely different from the present, the reasoning applicable is, I think, analogous. There the defendant was a ship-owner and undertook to carry the plaintiff's sheep from a foreign port to England. On the voyage, some of the sheep were washed overboard by reason of the defendants' neglect to take a precaution enjoined by an order of the Privy Council, which was made under the authority of the Contagious Diseases (Animals) Act, 1869, sec. 75. It was held, that the object of the statute and the order being to prevent the spread of contagious disease among animals and not to protect them against perils of the sea, the plaintiffs could not recover. Kelly, C. B., at p. 129, says: "And if we could see that it was the object, or among the objects of this Act, that the owners of sheep and cattle coming from a foreign port should be protected by the means described against the danger of their property being

washed overboard, or lost by the perils of the sea, the present action would be within the principle.

But, looking at the Act, it is perfectly clear that its provisions were all enacted with a totally different view; there was no purpose, direct or indirect, to protect against such damage."

Pigott, B., at p. 130, says: "Admit there has been a breach of duty; admit there has been a consequent injury, still the Legislature was not legislating to protect against such an injury, but for an altogether different purpose; its object was not to regulate the duty of the carrier for all purposes, but only for one particular purpose."

Also the observations of Pollock, B., at pp. 130-1, and the cases there referred to.

The plaintiff's infancy has, I think, a direct bearing upon the question of the defendants' liability.

"During the interval between fourteen years and seven, an infant shall be *prima facie* deemed to be *doli incapax*, and be presumed to be unacquainted with guilt; yet this presumption will diminish with the advance of the offender's years, and will depend upon the peculiar facts and circumstances of his case": Russell on Crimes, 6th ed., vol. 1, p. 114.

An infant cannot, any more than an adult, recover damages for the injury which has been caused by his own negligence: Simpson on Infants, 2nd ed. p. 110. But it is said that though the defendant is not liable if the injury be caused entirely by the infant's negligence, he is liable if the infant has only been guilty of contributory negligence: p. 111.

In *Gardner v. Grace* (1858), 1 F. & F. 359, it appeared that the defendant was driving, when the plaintiff, aged three years and a quarter, ran out into the road, was knocked down and run over. The evidence was contradictory as to the speed at which the defendant was driving. Channel, B., said: "The doctrine of *contributory* negligence does not apply to an infant of tender age. To disentitle the plaintiff to recover, it must be shewn that the injury was occasioned entirely by his own negligence."

Makins v. Piggott (1898), 29 S.C.R. 188, and *McShane v. To-*

ronto, Hamilton and Buffalo R.W. Co., 31 O.R. 185, may be referred to as shewing the distinction where the infant is a wrong-doer, a trespasser upon the defendants' property, and where he is actuated by childish curiosity, which results in his injury by reason of the defendants' negligence in leaving a dangerous article (an explosive cap) where it might fall into the hands of persons unaware of its character. In the *Makins* case it was said, at p. 191, by King, J.: "If he was negligent and thereby contributed to the result, still, unless such negligence is necessarily to be imputed upon the evidence, it would be for the jury to pass upon it."

In the present case it has not, in my judgment, been made to appear that it was necessarily by the plaintiff's own negligence that the injury was caused. Without deciding whether an infant of tender years can be guilty of contributory negligence, I think upon the authorities, that in the present case it was for the jury to say, having regard to the plaintiff's age, to the location, and the circumstances of the case, whether or not, the plaintiff was guilty of contributory negligence. The plaintiff was not a trespasser. He was there as of right. So far as the defendants were concerned he had a right to ride his waggon if he pleased in descending the grade. At all events, he had not been warned not to do so, even if the by-law applied. Under the facts in this case, I think the learned trial Judge was right in submitting the whole case to the jury, and the jury having found, I see no reason to disturb the verdict. The damages are not, I think, unreasonable, having regard to the nature and extent of the injuries. Appeal dismissed with costs.

FALCONBRIDGE, C.J., concurred in the judgment of CLUTE, J.

DAMAGES—ASSIGNMENT OF CLAIM.

ONTARIO.]

[DIVISIONAL COURT.

McCORMACK v. TORONTO R.W. Co.

(13 O.L.R. 656.)

*Damages—Assignment of Claim for—Chose in Action—Assignability of—
Ontario Judicature Act, sec. 58, sub-sec. 5.*

The plaintiff brought this action for damages for personal injuries sustained by his being run down by a car of the defendants, and for the killing of his master's horse which he was riding at the time, and in respect to which he claimed under assignment from his master :—
Held, that the action was properly dismissed as to the latter claim upon the ground that it was not an assignable chose in action.

THIS was an appeal from the judgment of Anglin, J., after the trial of this action, in which the circumstances of the case are fully set out.

The action was tried with a jury at Toronto on October 1st, 1906.

J. M. Godfrey, for the plaintiff.

D. L. McCarthy, for the defendants.

October 26, 1906. ANGLIN, J.:—The plaintiff sues for personal injuries to himself sustained by his being run down by a car of the defendant company, and also for the killing of the horse which he was riding, the property of his master; claiming, as to the latter, under an assignment from the master made in consideration of the plaintiff's releasing a claim for wages amounting to \$8.

The jury found the defendants liable, and assessed the damages for the plaintiff's personal injuries at \$100, and for the killing of the horse at the sum of \$125.

The interesting question is raised by the defendants whether the right of the master to recover damages for the killing of his horse by the defendants was assignable to the plaintiff.

Section 58, sub-sec. 5, of the Judicature Act, is as follows:

“Any absolute assignment, made on or after the 31st day of December, 1897, by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal chose in action of which express notice in writing shall have been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this section had not been enacted) to pass and transfer the legal right to such debt or chose in action from the date of such notice and all legal and other remedies for the same and the power to give a good discharge for the same without the concurrence of the assignor.”

This statutory provision has been held to have only affected procedure, and not to have enlarged the class of things lawfully assignable. In *King v. Victoria Insurance Co.*, [1896] A.C. 250, the Supreme Court of Queensland had held that the words “debt or other legal chose in action” include “all rights the assignment of which a Court of law or equity would before the Act have considered lawful.” p. 254; and Lord Hobhouse, speaking for the Judicial Committee, said, at p. 256: “Their Lordships do not express any dissent from the views taken in the Court below of the construction of the Judicature Act with reference to the term ‘legal chose in action.’” See, too, *Tolhurst v. The Associated Portland Cement Manufacturers, Ltd.*, [1902] 2 K.B. 660, at p. 676, [1903] A.C. 414, at p. 424; *The British South Africa Company v. The Companhia De Mocambique*, [1893] A.C. 602, at p. 629.

But, while the Queensland Court expressly held that a right to recover damages for injuries to a cargo of wool sustained in a collision, was a “legal chose in action,” and assignable to the plaintiff as such, the Judicial Committee “prefer to avoid discussing a question not free from difficulty, and to express no opinion what limitation, if any, should be placed on the literal meaning of that term. They rest their judgment on the broader and simpler ground that a payment honestly made by insurers in consequence of a policy granted by them, and in satisfaction of a claim by the insured, is a claim made under the policy, which entitles the insurers

to the remedies available to the insured": p. 256. The assignability they rest upon the right of subrogation, holding that the insurer, being thus entitled to the remedy of the insured, the assignment in writing, under the Judicature Act, was effectual to enable the insurer to sue in his own name. The assignability of such a right of recovery, therefore, apart from the right of subrogation, rests entirely upon the authority of the Supreme Court of Queensland, and not at all upon that of the Privy Council. But see *Pritt v. Connecticut Fire Insurance Company* (1896), 23 A.R. 449, at p. 453, per Osler, J.A.

In *Laidlaw v. O'Connor* (1892), 23 O.R. 696, Armour, C.J., regarding a claim by a client against a firm of solicitors for negligence in directing the distribution of certain moneys, as arising out of tort, held it not assignable. In the Divisional Court, while this judgment was affirmed, on the ground of absence of proof of negligence, MacMahon, J., treating the claim as one "arising out of contract," held it to be assignable under the provisions of R.S.O. 1887, ch. 122, sec. 7. But in *May v. Lane* (1894), 71 L.T. 869, the English Court of Appeal held that a right to recover damages for breach of contract to lend money is not assignable, Rigby, L.J., saying: "In my opinion there was nothing that could be assigned. We have been referred to the Judicature Act, sec. 25, sub-sec. 6 of which deals with absolute assignments in writing 'of any debt or other legal chose in action,' and it was said that the subject of this 'assignment,' as it is called, which at the best was only a cause of action, is a 'chose in action' within that section. That expression means a thing not in possession which can be sued for. The Judicature Act was never meant to include in it every cause of action, such as, for instance, for an assault. If that were so, the law of champerty and maintenance would be shaken. No such enormous change in the law has been made by this section": p. 870.

In *Dawson v. Great Northern and City R.W. Co.*, [1904] 1 K.B. 277, Wright, J., deeming compensation for an injury to lands under statutory authority to be in the nature of damages for a

tort, held that the right to recover such compensation is not a legal chose in action, and is, therefore, non-assignable.

The Court of Appeal reversed this judgment, on the ground that such a claim for compensation is not a claim for damages for a wrongful act, [1905] 1 K.B. 260, but the Lords Justices certainly do not countenance the view that a right of action *ex delicto* is assignable.

There is a very considerable body of English authority for the proposition that a right to damages, though arising *ex delicto* is a chose in action: *Colonial Bank v. Whinney* (1885), 30 Ch.D. 261, 275, 287, (1886), 11 App. Cas. 426; *Termes de la Ley*, "Chose in Action;" Blount's Law Dictionary, "Chose in Action;" Williams on Personal Property, 12th ed., p. 4. Blackstone, apparently, held the contrary view: see articles in *Law Quarterly Review*, vol. 10, p. 143, at p. 152; vol. 9, p. 311; vol. 20, p. 113; *Warren's Choses in Action*, p. 161.

In *Cohen v. Mitchell* (1890), 25 Q.B.D. 262, the plaintiff sued as assignee for valuable consideration of a cause of action for wrongful conversion of goods. After he had recovered a verdict, the trustee in bankruptcy of the assignor claimed the amount of the verdict. He failed to obtain it, his intervention being held to have been too late. Although the case went to the Court of Appeal, the validity of the assignment was not questioned. But it was not necessary to the decision that it should be passed upon.

In *Stanley v. Jones* (1831), 7 Bing. 369, at p. 375, we find this passage in the argument: "Bosanquet, J.: Could a claim for unliquidated damages arising out of *tort* be assigned? Perhaps, in some instances; as a claim for damages on the running down a ship; but not for *crim. con.* or slander. Park, J.: The distinction seems not unreasonable, and consistent with morals and law." See, too, *Simpson v. Lamb* (1857), 7 E. & B. 84.

That rights to recover damages for tort are assignable under Scotch law is distinctly affirmed in *Traill & Sons v. Actieselshabat Dalbeattie, Limited* (1904), 6 F. 798. Notwithstanding the idea of several text writers that causes of action in tort arising out of injuries to property, in which the measure of damages is certain,

differ materially from causes of action arising out of personal injuries; that many objections which may be urged against holding the latter class of causes of action to be assignable do not apply to the former; and that, although the latter are non-assignable, the former may be assigned—a view which receives some support from the dictum of Park, J., in *Stanley v. Jones*, *ubi sup.*, and is held by many Courts in the United States—I can find no English or Canadian authority upon which to rest such a distinction. It is true that causes of action of the former class pass to assignees in bankruptcy, while those of the latter do not. But this is because of the construction put upon the Bankruptcy Acts. The decisions of the English Court of Appeal, in *May v. Lane*, of Wright, J., in *Dawson v. The Great Northern and City R.W. Co.*, and of Armour, C.J., in *Laidlaw v. O'Connor*, afford a body of authority which I may not disregard. They are quite inconsistent with the assignability of a cause of action *ex delicto*, though it be for injury to property as distinguished from personal injury. This view as to the non-assignability of rights to damages *ex delicto* accords with doctrines of English jurisprudence which have obtained for many years: Y.B. 34 Hen. VI. 30, pl. 15; *Prosser v. Edmonds* (1835), 1 Y. & C. 481, at pp. 497, 499, and, excluding American cases, is in conflict only with the Queensland decision in *King v. Victoria Fire Insurance Company*. It must, in my opinion, prevail.

There will, therefore, be judgment for the plaintiff for the sum of \$100 for his personal injuries, and dismissing the claim for damages for the destruction of the horse. As the plaintiff, apparently, brought his action for both causes in good faith and with a desire to avoid multiplicity of suits, I exercise my discretion as to costs in his favour to the extent of awarding him costs on the county court scale without set-off.

The appeal was argued on February 18th, 1907, before FALCONBRIDGE, C.J.K.B., and CLUTE and RIDDELL, JJ.

J. M. Godfrey and T. N. Phelan, for the plaintiff, appellant, contended that a chose in action is only non-assignable when to

assign would amount to champerty: *May v. Lane*, 71 L.T. 869, whereas here the trial Judge had held that the transaction was *bonâ fide*, and there was no agreement for any division of the proceeds of the law suit: Warren on Choses in Action, ed. 1899, p. 161; that under sec. 25, sub-sec. 6, of the Judicature Act, R.S.O. 1897, ch. 51, in its present form, any legal chose in action whatever is assignable in absence of champerty: *Campbell v. Maloney* (1897) 28 S.C.R. 228; *King v. Victoria Ins. Co.*, [1896] A.C. 250; *Laidlaw v. O'Connor*, 23 O.R. 696.

H. S. Osler, K.C., for the defendant, was not called on.

PER CURIAM. We think the judgment appealed from quite correct, exhaustive, and complete. Appeal dismissed with costs.

NOTE.

Assignment of Judgment.

For other cases on assignment of judgment see *Rennie v. Quebec Bank*, 1 O.L.R. 303; 3 O.L.R. 541; *Jones v. Humphreys* (1902), 1 K.B. 10; *Hughes v. Pump House* (1902), 2 K.B. 190, and *Torkington v. Magee* (1902), 2 K.B. 427; (1903), 1 K.B. 644.

CRIMINAL CODE—RAILWAY ACT—CONVICTION.

ONTARIO.]

[COURT OF APPEAL.

REX v. HAYS.

(14 O.L.R. 201.)

Conviction—Officer of railway company—Offence of the company—Criminal Code, 55 & 56 Vict. ch. 29, sec. 138 (D.)—16 Vict. ch. 37, sec. 3 (C.).

The defendant who was second vice-president and the general manager of a railway company was convicted by a police magistrate under sec. 138 of the Criminal Code of an offence against sec. 3 of 16 Vict. ch. 37 (C.) on the following findings: that the company had not during the year 1906 fixed or issued a tariff of fares or charges, payable by each third class passenger by any train on said railway for each mile travelled; that the company had not during that time permitted a third class passenger to travel by any train on said railway at the fare or charge of one penny currency for each mile travelled; and that the said company had not, during that time provided that at least one train having in it third class carriages should run each day to.....from....., being part of the said railway:—

Held, that the conviction of the defendant for the omission of the company was bad.

Held, also, that in any event the operation of section 138 of the Criminal Code was in this case excluded by the existence of a penalty for the offence under section 294 of the Railway Act, 1903.

SPECIAL case reserved by the police magistrate of the city of Toronto.

The facts and findings of the magistrate appear fully in the judgments.

The case was argued on the 31st January, 1907, before Moss, C.J.O., OSLER, GARROW, MACLAREN and MEREDITH, JJ.A.

Wallace Nesbitt, K.C., and *A. M. Stewart*, for the defendant. The conviction is under sec. 138 of the Code for an offence against sec. 3 of 16 Vict. ch. 37, but there is a new mode of punishment now provided by sec. 294 of the Railway Act of 1903, 3 Edw. VII. ch. 58 (D.). The defendant is convicted, but the magistrate's findings were that the company was guilty: *The Queen v. Tyler*, [1891] 2 Q.B. 588, at p. 592, *per* Bowen, L.J. The magistrate has

no jurisdiction; the defendant lives in Montreal, and the offence, if any, was committed on the line of railway between Toronto and Port Hope. There was no disobedience of an Act of the Parliament of Canada or any Legislature in Canada, as 16 Vict. ch. 37 was an Act of the old Province of Canada. Section 3, sub-sec. (a) of the Code excludes that. The defendant has not wilfully committed any offence: *Re E. J. Parke* (1899), 30 O.R. 498; *Johnson v. Allen* (1895), 26 O.R. 350.*

J. W. Curry, K.C., for the complainant, *contra*. There was a duty imposed upon the railway; the defendant is its head, and the only official head in Canada. The statute imposing the duty is still in force, 16 Vict. ch. 37, sec. 3; the defendant is liable, and properly convicted under sec. 138, Criminal Code, 1892. Sub-sec. (a) of sec. 3 of the Criminal Code includes Acts of the Parliament of the old Province of Canada. The defendant, being in control of the railway and the only one in control, in Canada, is personally responsible.

Nesbitt, in reply, cited *The Grand Trunk R.W. Co. v. Perrault* (1905), 36 S.C.R. 671.

March 14, 1907. OSLER, J.A.:—This conviction is open to a great many objections, most of which I should say are fatal to it, but only one or two of the most obvious need be noticed.

The defendant is second vice-president and general manager of the Grand Trunk Railway Company of Canada. He has been summarily tried under Part LV. of the Criminal Code for an offence against sec. 3 of 16 Vict. ch. 37, 1852, an Act to incorporate the Grand Trunk Railway Company, and sec. 138 of the Criminal Code, which enacts, that, every one is guilty of an indictable offence and liable to one year's imprisonment who, without lawful excuse, disobeys any Act of the Parliament of Canada or of any Legislature in Canada by wilfully doing any act which it forbids, or omitting to do any act which it requires to be done, unless some penalty or other mode of punishment is expressly provided by law.

Section 3 of the Railway Act referred to enacts, that "the fare

*The argument as to the repeal of sec. 3 of 16 Vict. ch. 37, was not dealt with in the judgments and is not reported.—*Rep*.

or charge for each third-class passenger by any train on the said railway, shall not exceed one penny currency for each mile travelled: and that at least one train having in it third-class carriages shall run every day throughout the length of the line."

The complaint is, that the defendant—not the company—has disobeyed this section, by omitting to do that which the section requires to be done. The magistrate finds, that the company has not at any time during the year 1906 fixed upon a tariff of charges or fares payable by each third-class passenger by any train on said railway for each mile travelled; that the company has not during that time permitted a third-class passenger to travel by any train on said railway at the fare or charge of one penny currency for each mile travelled; and further, that the said company has not during that time provided, that at least one train having in it third-class carriages shall run each day from Kingston to Toronto, "being part of the said railway."

Upon these findings the magistrate proceeded to convict the defendant Charles M. Hays—though no formal conviction seems to have been drawn up—of the offence charged, and the conviction having been questioned on the ground that it was without jurisdiction and was erroneous in point of law, the learned magistrate submitted the question to this Court, whether, upon the facts so found, the conviction was right.

Upon the mere statement of the case the answer must be that the conviction is wrong.

1. The charge is that Hays committed the offence, while the findings are that the company did so. In the absence of some clear statutory enactment the defendant cannot be punished for the default of his company.

2. There is no authority to prosecute the defendant under sec. 138. The obligation, if there be one, is the company's obligation, and the company, and not their official, however important and commanding the position which he occupies, is the only one to be prosecuted, if a prosecution will lie for its breach, so far as sec. 138 of the Code can be invoked for that purpose. That a corporation

could not under that section be punished by imprisonment would not warrant the prosecution of one of its servants.

Quære: Whether the latter part of sec. 958 of the Code could be applied if the corporation itself had been prosecuted?

3. Section 138 cannot apply under any circumstances, inasmuch as sec. 294 of the recent Railway Act, 3 Edw. VII. ch. 58 (D.), now enacts that "The company, or any director or officer thereof, . . . doing, causing, or permitting to be done, any matter, act or thing contrary to the provisions of this or the special Act, . . . if no other penalty is, in this or the special Act, provided for such act or omission, is liable for each offence, to a penalty of not less than twenty dollars, and not more than five thousand dollars, in the discretion of the Court," etc.

I do not suggest that a prosecution would lie under this section for the particular omission complained of against an official of the company. Doubtless some acts or omissions may be those of the individual servants of the company, but others can be properly attributed only to the company or corporation itself. It is enough to say here, that sec. 294 deprives sec. 138 of the Criminal Code of its application.

I think we ought not on this appeal to deal with the question whether sec. 3 of the Act of 1852 has been impliedly repealed by the Railway Act of 1903. That is a question which can be more conveniently heard and disposed of by proceedings taken before the Railway Commission, whose decision in that respect can be reviewed by the Supreme Court.

MOSS, C.J.O., and GARROW, J.A., concurred in the judgment of OSLER, J.A.

MACLAREN, J.A.:—The defendant, who is the second vice-president and general manager of the Grand Trunk Railway, was accused under sec. 138 of the Criminal Code, 1892, before the police magistrate for the city of Toronto, of having without lawful excuse disobeyed sec. 3 of ch. 37 of 16 Vict. of the Province of Canada, by omitting to do what that section requires to be done, *viz.*, to carry

third-class passengers for the fare of one penny for each mile travelled, and to provide, that at least one train having in it third-class carriages shall run every day throughout the length of the line.

The defendant on December 1st, 1906, subject to his objections, consented to be tried summarily and pleaded not guilty.

After hearing the evidence the magistrate made the following findings: (1) That the Grand Trunk Railway Company has not at any time during 1906 fixed or issued a tariff of fares, payable by each third-class passenger by any train on said railway for each mile travelled; (2) that it has not during that time permitted a third-class passenger to travel by any train on said railway, at the fare of one penny currency for each mile travelled; (3) that it has not during that time provided that at least one train having in it third-class carriages shall run each day to Kingston from Toronto, being part of said railway.

He thereupon found the defendant guilty of the offence charged, and the conviction having been questioned on the ground that it was without jurisdiction and was erroneous in point of law, he reserved for this Court the question whether upon the facts so found the conviction was right.

The above statute, 16 Vict. ch. 37, of the old Province of Canada, incorporated the Grand Trunk Railway Company and authorized it to construct a railway from Toronto to Montreal. Section 3 provides that "The fare or charge for each first-class passenger by any train on the said railway, shall not exceed two pence currency for each mile travelled: the fare or charge for each second-class passenger . . . , shall not exceed one penny and one-half penny currency for each mile travelled: and the fare or charge for each third-class passenger . . . , shall not exceed one penny currency for each mile travelled: and that at least one train having in it third-class carriages shall run every day throughout the length of the line."

Section 138 of the Criminal Code, under which the charge was laid, reads as follows:—"Every one is guilty of an indictable offence and liable to one year's imprisonment who, without lawful excuse, disobeys any Act of the Parliament of Canada, or of any Legislature

in Canada, by wilfully doing any act which it forbids, or omitting to do any act which it requires to be done, unless some penalty or other mode of punishment is expressly provided by law."

Against the validity of the conviction the following grounds were urged before us: (1) That if there could be a conviction under these Acts it was of the company and not of Mr. Hays, and the company alone could be punished; (2) that there was no *mens rea*; (3) that the defendant was a resident of Montreal and the magistrate had no jurisdiction; (4) that there was no disobedience of any Act of the Parliament of Canada or of any Legislature in Canada; (5) that if there was an offence, sec. 294 of the Railway Act of 1903 fixed the penalty, viz., from \$20 to \$5,000, and sec. 138 of the Code did not apply; (6) that sec. 3 of 16 Vict. ch. 37, above quoted, was repealed by 46 Vict. ch. 24, sec. 12 (D.); and by sec. 251 of the Act of 1903 all tolls are to be fixed by the company or the directors subject to the approval of the Board of Railway Commissioners, which has been done in the present case.

As to the first of these objections, no doubt the law formerly was that officers and directors might be punished for the offences of their companies or corporations. The authority quoted for this was a dictum of Lord Holt reported in 12 Mod. 559, where he said: "A corporation is not indictable, but the particular members of it are." The latest case in which this was followed of which I am aware was in 1834, *Rex v. Medley*, 6 C. & P. 292. In that case the directors of an incorporated gas company were indicted and convicted of a nuisance committed by the servants of the company without their knowledge and contrary to their directions.

This rule is said to have been followed, partly because imprisonment, the punishment prescribed for many offences, was inapplicable to corporations, and partly because the fact of a corporation being an entity distinct from the individual corporators was formerly not kept so clearly in mind as at present, but largely on account of the practical difficulties in prosecuting corporations. At the assizes and the sessions it was necessary that the accused should appear in person; they could not appear by attorney. As corporations could not comply with this rule, the indictment had to be

removed by *certiorari* to the King's Bench, where the accused could appear by attorney. See *Regina v. The Birmingham and Gloucester R.W. Co.* (1840), 9 C. & P. 469, and *ibid.* 3 Q.B. 223.

In England it is still the law that a corporation cannot be prosecuted at the sessions: Archbold's Criminal Pleading, 23rd ed., p. 11.

In this country the Dominion Act of 1883, 46 Vict. ch. 24, removed all difficulties as to the prosecution of corporations by laying down a special procedure, and providing that a corporation might appear by attorney in any court in which an indictment was found, and that it should no longer be necessary to remove the indictment into a superior court to compel the corporation to plead to it. These provisions now form secs. 916 to 920 of the Criminal Code in R.S.C. 1906.

It had long been held that an indictment would lie against a corporation for non-feasance. That it would also lie for mis-feasance was laid down by Denman, C.J., in *The Queen v. The Great North of England R.W. Co.* (1846), 9 Q.B. 315. This has been cited and favourably commented upon in many subsequent cases, among them *Whitfield v. The South Eastern Ry. Co.* (1858), E.B. & E. 115; *The Pharmaceutical Society of Great Britain v. The London and Provincial Supply Association, Ltd.* (1879), 4 Q.B.D. 313; *The Queen v. Tyler*, [1891] 2 Q.B. 588; and *The Union Colliery Co. v. Her Majesty the Queen* (1900), 31 S.C.R. 81.

It is now well settled law that a corporation may be prosecuted for crimes not only of omission but also of commission, except such as from their nature cannot be committed by a corporation, such as treason, murder, perjury and the like; and also except as to those crimes for which imprisonment or corporal punishment is the only penalty provided. Thus a corporation cannot be indicted for manslaughter, as the punishment may be imprisonment for life: Criminal Code, sec. 236; and a fine cannot be substituted: Criminal Code, sec. 958; *Regina v. Great West Laundry Co.* (1900), 13 Man. L.R. 66.

I think that "everyone," in sec. 138 of the Code, is within sec. 3 (t), the interpretation clause of the Code, which says that the expressions "person," "owner," and other expressions of the same kind, include His Majesty and all public bodies, bodies corporate, etc.

The maximum penalty for the violation of sec. 138 is one year's imprisonment, so that by sec. 958 of the Code a fine may be imposed in lieu thereof.

It would appear, therefore, that if the company has been guilty of a breach of these statutes there is no obstacle in the way of its prosecution and punishment, especially as the alleged offence is one of non-feasance or omission, and one for which a corporation could have been prosecuted even under the older law.

I am not aware of any case, either in England or in this country, within the last seventy years, where an officer or director of a company has been held liable for an offence committed by the company, except as an aider, abettor, or accessory, nor am I aware of any provision of our law under which this could be done, except when he has actually aided or abetted in the commission of the offence, or counselled or procured its commission.

Such is also the law in the United States: see *Thompson on Corporations*, par. 4114, and *People v. Clark* (1891), 14 N.Y. Supp. 642. It is there laid down that where the offence of the corporation is misfeasance, all officers or other person participating in the violation of the law are guilty; where the offence is non-feasance, it is an offence only of the corporation or party upon whom the duty is imposed by the statute.

As the Act of 1852 imposes the duty of running these third-class carriages and carrying third-class passengers for a penny a mile upon the Grand Trunk Railway Company alone, the defendant can only be held liable, if at all, under part of the latter sec. 61 of the Code (now sec. 69 of the Code in R.S.C. 1906, ch. 146), which reads as follows: "Everyone is a party to and guilty of an offence who (a) actually commits it; or, (b) does or omits an act for the purpose of aiding any person to commit the offence; or, (c) abets any person in commission of the offence; or, (d) counsels or procures any person to commit the offence."

There is no offence, either on the part of the company or of the defendant, in running the trains which they now operate; they can lawfully run a hundred or more passenger trains such as they run now; the offence charged is in not running one train a day with

third-class carriages. The offence charged is a pure case of non-feasance.

In order to make out a case against the defendant, it was necessary for the prosecution to shew that he aided or abetted the commission of the offence or counselled or procured it. So far is this from being the case, that each of the three findings of the police magistrate is against the company and against the company alone; the defendant is not even mentioned or alluded to in a single one of them. The complainant does not even refer to him in his examination in chief, and all he says in cross-examination is: "Defendant lives in Montreal I believe, and is general manager and second vice-president of the Grand Trunk Railway."

All that the only other witness says about him is: "Defendant is resident of Montreal. He is in charge of the operation of the line in Canada and acts under the board of directors who reside in England. He is the responsible head in Canada I should say. He is occasionally in the city of Toronto in reference to railway business, I have no doubt."

This evidence falls far short of making him out either a principal, or an aider, abettor or accessory, in the offence charged, if offence there be.

The authorities go to shew that in order to hold the defendant liable under such provisions as those in the statutes above cited, active participation in the commission of the offence must be proved against him. Mere acquiescence is not sufficient: *Rex v. Hendrie* (1905), 11 O.L.R. 202. For aught that appears in this case, it may be that the defendant may be personally in favour of the company running third-class carriages, for a fare of a penny a mile, and may even have tried to induce the board to do so.

This point being conclusive of the present case, it becomes unnecessary to consider the other objections to the conviction.

The question reserved for us by the police magistrate should be answered in the negative.

MEREDITH, J.A.:—This case presents upon its face these extraordinary and illogical features: the company, and the company

only, have been found guilty: and yet the individual, and the individual only, has been convicted. There is no power to make a criminal of one for the offences of another.

If the company have committed a crime, the company should be prosecuted, and, on due proof of it, be convicted and punished. If the defendant be guilty, his guilt must be proved, and found, before conviction. There is no excuse for his conviction for an offence found to have been committed by the company only. A servant is not answerable for the crimes of his master; he is answerable only for those to which he is proved to have been a party. It is not needful to say what would have been the result if the police magistrate's finding had been that the defendant had done those things which he found that the company only had done. Nor does it seem to me to be proper to consider some of the other formidable objections to this conviction in the absence of the company who are mainly interested in them.

The conviction is clearly bad.

NOTE.

Indictment of Corporations. This subject has been previously dealt with in *Regina v. Union Colliery Co.*, 1 Can. Ry. Cas. 499; *The Union Colliery Co. v. The Queen*, *ibid.* 511 and notes page 521. For a decision upon the indictment of an incorporated association for conspiracy: see *Rex v. Master Plumbers, etc., Association*, 14 O.L.R. 295.

MANDAMUS—THIRD-CLASS FARES.

ONTARIO.]

[TEETZEL, J.

[IN CHAMBERS.

RE ROBERTSON AND GRAND TRUNK R.W. Co.

(14 O.L.R. 497.)

Mandamus—Railway Company—Carriage of Passengers—Rates and Accommodation—Statute Incorporating Grand Trunk Railway Company—Jurisdiction of Board of Railway Commissioners.

Two questions must be found in favour of the applicant before the writ of prerogative mandamus can issue: first, has the applicant a specific legal right to the performance of some duty by the respondent; and, second, will the applicant without the benefit of the writ be left without effectual remedy?

Where the applicant sought a mandamus to compel the Grand Trunk Railway Company, pursuant to sec. 3 of their Act of incorporation, 16 Vict. ch. 37 (C.), to run a train containing third-class carriages, and to permit the applicant to travel therein on payment of a fare not exceeding one penny a mile:—

Held, that the applicant had an adequate remedy under the provisions of the Dominion Railway Act, 1903 (secs. 8, 23, 25, 44, 214, and 294, being specially referred to), and that that remedy could be more conveniently applied and executed under the direction and supervision of the Board of Railway Commissioners than by the Court; and the application was refused.

THIS was an application by one Robertson for a prerogative writ of mandamus directing the Grand Trunk Railway Company to run every day throughout the length of their line at least one train having in it third-class carriages, and to compel the company to permit the applicant to travel in such third-class carriage on payment of a fare not exceeding one penny for each mile travelled, as provided for by sec. 3 of ch. 37 of 16 Vict. (C.), being the Act incorporating the company.*

* 3. And be it enacted, that the gauge of the said railway shall be five feet six inches; and the fare or charge for each first-class passenger by any train on the said railway, shall not exceed two pence currency for each mile travelled, the fare or charge for each second-class passenger by any train on the said railway, shall not exceed one penny and one halfpenny currency for each mile travelled, and the fare or charge for each third-class passenger by any train on the said railway, shall not exceed one penny currency for each mile travelled; and that at least one train having in it third-class carriages shall run every day throughout the length of the line.

The application was heard by TEETZEL, J., in Chambers, on the 5th February, 1907.

J. W. Curry, K.C., for the applicant.

Wallace Nesbitt, K.C., for the respondents.

April 2, 1907. TEETZEL, J.:—A prerogative mandamus is preserved in our jurisprudence for the extraordinary cases where without it a party would be left without an effectual remedy to compel the performance of some duty in which the applicant is interested and to the performance of which he has a specific legal right: see *Holmested and Langton's Judicature Act*, 3rd ed., p. 77, and cases there cited.

Two questions must be found in favour of the applicant before the writ can issue, according to the practice of the Court, which was adopted coterminously with the origin of the writ as a judicial proceeding, and has been uniformly followed since, namely: Has the applicant a specific legal right to the performance of some duty by the respondent, and, secondly, will the applicant, without the benefit of this writ, be left without effectual remedy?

In reference to the second question, it is stated in *Tapping on Mandamus*, p. 69 (*18): "The writ of mandamus is not a writ grantable of right, but by prerogative, and, amongst other things, it is . . . the absence or want of a specific legal remedy, which gives the Court jurisdiction to dispence it. It is not granted to give an easier or more expeditious remedy; but only where there is no other remedy, being both legal and specific; and so long and uniformly has the Court adhered to this doctrine, and refused to grant, or if granted quashed, the writ in cases where there is a specific legal remedy, either at common law or by Act of Parliament, that it has become a principle of the law of this subject. . . . Thus, if a statute prescribe a particular remedy, no other remedy can be taken, and therefore in such a case a mandamus will not lie."

Unless the section of the incorporating Act in question has been superseded or repealed by the subsequent general legislation respecting railways, which was supported by the argument of counsel for

the respondents, I should assume that, according to the practice of the Courts and upon the authorities cited by counsel for the applicant, he has the right to compel the performance by the company of the provisions of the section above referred to, and would be entitled to a writ of mandamus, unless it is clear that he has another efficient remedy either at common law or by statute; and this involves the consideration of the second question. As to this I am clearly of the opinion that under the provisions of the Railway Act, 1903, the applicant is furnished a specific and adequate remedy for the grievances complained of.

Section 8 of the Act constitutes the Board of Railway Commissioners a Court of Record, with an official seal.

Section 23 is as follows:—

“The Board shall have full jurisdiction to inquire into, hear and determine any application by or on behalf of any party interested:

“(a) Complaining that the company, or any person, has failed to do any act, matter or thing required to be done by this Act, or the Special Act, or by any regulation, order or direction made thereunder, by the Governor in Council, the Board, the Minister, or any inspecting engineer, or has done or is doing any act, matter or thing contrary to, or in violation of, this Act, or the Special Act, or any such regulation, order, or direction;

“(b) Requesting the Board to make any order, or give any direction, sanction or approval, which by law it is authorized to make or give:

“And the Board may order and require any company or person to do forthwith, or within or at any specified time, and in any manner prescribed by the Board, so far as is not inconsistent with this Act, any act, matter or thing which such company or person is or may be required to do under this Act, or the Special Act, and may forbid the doing or continuing of any act, matter or thing which is contrary to this Act, or the Special Act; and shall have full jurisdiction to hear and determine all matters whether of law or of fact, and shall, as respects the attendance and examination of witnesses, the production and inspection of documents, the en-

forcement of its orders, the entry on and inspection of property, and other matters necessary or proper for the due exercise of its jurisdiction under this Act, or otherwise for carrying this Act into effect, have all such powers, rights and privileges as are vested in a Superior Court.

"2. The decision of the Board upon any question of fact, and as to whether any company, municipality or person is, or is not, a party interested within the meaning of this section, shall be binding and conclusive upon all companies and persons, and in all courts."

Section 25 authorizes the Board to make orders and regulations regarding the operation of trains, and, *inter alia* (g), "with respect to any matter, act or thing which by this or the Special Act is sanctioned, required to be done, or prohibited."

Section 44 contains provisions for appeal to the Supreme Court.

See also secs. 214 and 294.

Not only do I think that adequate remedy is provided for the applicant under the provisions of the Railway Act, 1903, but that such remedy could be much more conveniently applied and executed under the direction and supervision of the Railway Commission than by the Court, and, therefore, in accordance with the practice I have alluded to, I must refuse the application with costs.

Reference may also be had to: *Pasmore v. Oswaldtwistle Urban District Council*, [1898] A.C. 387, and *Attorney-General v. The President, etc., of the Shire of Preston* (1902), 28 Victorian L.R. 402, 410.

NOTE.

Mandamus.—For a discussion of the practice in granting a writ of mandamus against a railway company: see Canadian Railway Act (Annotated), p. 338.

CARRIER—PASSENGERS—THIRD-CLASS FARES.

CANADA.]

[BOARD OF RAILWAY COMMISSIONERS.]

ROBERTSON V. GRAND TRUNK RY. CO.

Carrier of passengers—Third class passengers—Two cent (penny) fare—Powers of Board—Act of Incorporation 16 Vict. ch. 87 (C.)—Railway Act, 1903, secs. 3, 4, 5, 6, 212, ss. 2, 214, 251, 256, 257, 263, 264, 265—6 Edw. VII. ch. 42, secs. 18, 23—Railway Act, ch. 37, R.S.C., 1906, secs. 26, 30, 55, 269(c), 284, 314, 330, 331.

Held, that section 3 of the Act of Incorporation of the Grand Trunk Ry. Co., 16 Vict. ch. 87 (C.) enacting that the fare or charge for each third class passenger by any train on the said railway, shall not exceed one penny currency per each mile travelled, and that at least one train having in it third class carriages, shall run every day throughout the length of the line, has not been repealed either expressly or by implication by subsequent general railway legislation, and is still in force. Upon an application under section 26 of the Railway Act, ch. 37, R.S.C., 1906, the Board made an order requiring the company to run every day throughout the length of its line between Montreal and Toronto at least one train having in it third class carriages, and forbidding it to charge third class passengers fares at more than two cents per mile, and directing it to amend its special tariffs accordingly.

This was an application by W. N. Robertson for an order under sec. 26 of the Railway Act, ch. 37, R.S.C. 1906, directing the Grand Trunk Railway Company of Canada to issue third-class tickets at the rate of one penny per mile for each mile travelled, and directing the company to provide at least one train having in it third-class carriages, which shall run every day throughout the length of its line.

The application was heard before the Board at Toronto on 11th May, 1907.

J. W. Curry, K.C., for the complainant relied in his argument upon the various Railway Acts, and sections thereof cited in the judgment of the Chief Commissioner.

Wallace Nesbitt, K.C., for the company cited the following statement by *Wills, J.*, in *Great Central Consumers Gas Co. v.*

Clarke, 11 C.B.N.S. at page 835.—“I do not assent to the proposition quoted from Dwarris on Statutes, that, in order to effect a repeal of a former Act, the latter or repealing Act must contain express words. If that be the proposition which that learned author means to lay down, it clearly is not accurate. It is enough if there be words which by necessary implication repeal it.”

The Act of Incorporation of the Grand Trunk Ry. Co. passed by the Parliament of the Province of Canada is an Act of a Provincial Legislature, and consequently does not affect the Grand Trunk Ry. Co. which is a Dominion railway, and under the exclusive control of the Parliament of Canada. The Special and the General Acts must be read together in whole, and cannot be read in part.

Under secs. 330 and 331 of the Railway Act, ch. 37, R.S.C. 1906, the Board has full authority to fix the rates of fares and any provision of such a nature in the special Act has no force or effect. Further, all persons travelling on any of the lines of the Grand Trunk Ry. Co. should pay the same rates of fares and be treated alike.

Counsel cited in support of his argument the following cases: *Bramston v. Colchester*, 6 E. & B. 246; *Great Central Consumers Gas Co. v. Clarke*, 11 C.B.N.S. 814 at 838; *Daw v. Metropolitan Board of Works*, 31 L.J.C.P. 223; *Duncan v. Scottish North-Eastern Ry. Co.* L.R. 2 H.L. Sc. 20; *Charnock v. Merchant* (1900), 1 Q.B. 474; *In re the Duke of Marlborough's Parliamentary Estates*, 8 T.L.R. 179; *Brown v. McMillan*, 7 M. & W. 196; *Luckraft v. Pridham*, 6 Ch.D. 205; *Re Cuckfield*, 19 Beav. 153; *Stuart v. Jones*, 1 E. & B. 22; *Regina v. Bridge*, 24 Q.B.D. 609; *Goodwin v. Sheffield* (1902), 1 K.B. 629; *Parry v. Croydon Commercial Gas & Coke Co.*, 15 C.B.N.S. 568; *Mersey Docks & Harbour Board v. Lucas*, 51 L.J.Q.B. 114 at 116.

July 4, 1907. THE CHIEF COMMISSIONER:—This is an application for an order directing the Grand Trunk Railway Company of Canada to issue third-class tickets at the rate of one penny

per mile for each mile travelled, and directing the company to provide at least one train having in it third-class carriages which shall run every day throughout the length of its line.

The application is based upon a clause in the original Act of Incorporation of the Grand Trunk Railway Company of Canada, 16 Vict. ch. 37, passed by the Parliament of the Province of Canada in the year 1852. Section 3 of that Act was as follows:

“3. And be it enacted, That the gauge of the said railway shall be five feet six inches; and the fare or charge for each first class passenger by any train on the said railway, shall not exceed two pence currency for each mile travelled, the fare or charge for each second class passenger by any train on the said railway shall not exceed one penny and one half penny currency for each mile travelled, and the fare or charge for each third class passenger by any train on the said railway, shall not exceed one penny currency for each mile travelled; and that at least one train having in it third class carriages shall run every day throughout the length of the line.”

The portion dealing with the gauge of the railway was repealed by Act of the Parliament of Canada, 36 Vict. ch. 18, sec. 23. None of the remainder of the section has ever been expressly repealed; and, if it still remains in force, the Board is bound, under the general jurisdiction given by sec. 26 of the Railway Act to order and require a railway company to do any act, matter or thing which such company is or may be required to do under its special Act, to make the order applied for.

The contention on the part of the company is that the provisions in question have been impliedly repealed by subsequent legislation. Section 2 of the special Act was as follows:

“2. And be it enacted, That the several clauses of the Railway Clauses Consolidation Act, with respect to the first, second, third and fourth clauses thereof, and also the several clauses of the said Act with respect to ‘Interpretation,’ ‘Incorporation,’ ‘Powers,’ ‘Plans and Surveys,’ ‘Lands and their Valuation,’ ‘Highways and Bridges,’ ‘Fences,’ ‘Tolls,’ ‘General Meet-

ings,' 'Directors — their Election and Duties,' 'Shares and their Transfer,' 'Municipalities,' 'Shareholders,' 'Actions for indemnity, and fines and penalties and their prosecutions,' 'Working of the Railway,' and 'General Provisions,' shall be incorporated in this Act, with the following modification for the ninth provision in the clause of the said Act, with respect to 'Plans and Surveys'; . . . and with the further exception of any enactments in the said clauses which may be inconsistent with the express provisions and enactments of this Act, in like matters: And the expression 'this Act' when used herein shall be understood to include all the clauses of the Railway Clauses Consolidation Act which are incorporated with this Act."

The clauses with respect to "Tolls" in the Railway Clauses Consolidation Act, 14 and 15 Vict. ch. 51, were contained in sec. 14 of that Act, and were, so far as of present importance, as follows:

"Tolls shall be from time to time fixed and regulated by the by-laws of the company, or by the directors, if thereunto authorized by the by-laws, or by the shareholders at any general meeting, and shall and may be demanded and received for all passengers and goods transported upon the railway or in the steam vessels to the undertaking belonging"; . . . "and all or any of the said tolls may, by any by-law, be lowered and reduced and again raised as often as it shall be deemed necessary for the interests of the undertaking: Provided that the same tolls shall be payable at the same time and under the same circumstances upon all goods and persons, so that no undue advantage, privilege or monopoly may be afforded to any person or class of persons by any by-law relating to the tolls." . . . "No tolls shall be levied or taken until approved of by the Governor in Council, nor till after two weekly publications in the *Canada Gazette* of the by-laws establishing such tolls, and of the Order in Council approving thereof. Every by-law fixing and regulating tolls shall be subject to revision by the Governor in Council from time to time, after approval thereof as aforesaid."

The same provisions respecting tolls appeared in the Consolidated Statutes of Canada, ch. 66; and by sec. 2 of that Act, "when not otherwise expressed, this and the following sections to the one hundred and twenty-fifth shall apply to every railway authorized to be constructed, or by any Act passed since the thirtieth day of August, 1851; . . . and this Act shall be incorporated with every such Act; and all the clauses and provisions in this Act, unless they are expressly varied or excepted by any such Act, shall apply to the undertaking authorized thereby, so far as applicable to the undertaking, and shall as well as the clauses and provisions of every other Act incorporated with such Act, form part of such Act, and be construed together therewith as forming one Act."

This legislation of the Province of Canada remained in force until the formation of the Dominion of Canada.

In 1868, in the first session of the first Parliament of the Dominion, was passed the Railway Act, 1868, in sub-sec. 12 of sec. 12 of which were embodied the provisions just mentioned respecting tolls, with the following addition:

"12. No by-law of any railway company by which any tolls are to be imposed or altered, or by which any party other than the members, officers and servants of the company are intended to be bound, shall have any force or effect until the same has been approved and sanctioned by the Governor in Council."

The last mentioned Act did not in terms repeal the previous railway legislation of the Province of Canada, and it does not appear to have had any application to the Grand Trunk Railway, as the clauses dealing with its application made it apply to railways thereafter to be constructed under the authority of any Act passed by the Parliament of Canada.

The Act of 1868 remained in force until 1879, when it was replaced by the Consolidated Railway Act, 1879. That Act provided that the provisions of the Act from sec. 5 to sec. 34, both inclusive, shall also "apply to every railway constructed or to be constructed under the authority of any Act passed by the

Parliament of Canada, and shall, so far as they are applicable to the undertaking, and, unless they are expressly varied or excepted by the Special Act, be incorporated with the Special Act, form part thereof, and be construed therewith as forming one Act."

By sec. 102 of the Act of 1879, the Railway Act, 1868, and various Acts amending it, were expressly repealed; but, again, no mention was made of the Act contained in the Consolidated Statutes of Canada.

In sec. 17 of the Act of 1879 were again embodied the before mentioned provisions respecting tolls, including the addition made in 1868. By sub-sec. 6, "All or any of the tolls may, by any by-law, be reduced and again raised as often as deemed necessary for the interests of the undertaking; but the same tolls shall be payable at the same time and under the same circumstances upon all goods and by all persons, so that no undue advantage, privilege or monopoly may be afforded to any person or class of persons by any by-law relating to the tolls."

By the Act of 1883, 46 Vict. ch. 24, sec. 12, sub-sec. 6 of sec. 17 of the Consolidated Railway Act, 1879, was repealed, and the following substituted therefor:—

"And whereas, it is expedient that a railway company should be enabled to vary the tolls upon the railway so as to accommodate them to the circumstances of the traffic, but that such power of varying should not be used for the purpose of prejudicing or favouring particular persons, or for the purpose of collusively and unfairly creating a monopoly, either in the hands of the company or of particular persons, therefore it shall be lawful for the company, subject to the provisions and limitations herein and in their special Act contained, from time to time to alter or vary the tolls by the special Act authorized to be taken, either upon the whole or upon any particular portions of the railway as they shall think fit: Provided that all such tolls be, at all times and under the same circumstances, charged equally to all persons, and after the same rate, whether per ton, per mile or

otherwise, in respect of all passengers and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine, passing only over the same portion of the line of railway; and no reduction or advance in any such tolls shall be made, either directly or indirectly, in favour of or against any particular company or person travelling upon or using the railway."

While sec. 6 of the Act of 1883 declared certain lines of railway, among others the Grand Trunk Railway, to be works for the general advantage of Canada, and provided that, "3. Railway companies by this Act brought within the legislative authority of Parliament shall have one year from the passing hereof within which to comply with the provisions of sub-sec. 5, sec. 15, of the Consolidated Railway Act, 1879," and sec. 1 of the Act of 1883, made secs. 48 and 49 of the Consolidated Railway Act, 1879, applicable to "every railway (except Government railways) and railway company subject to the legislative authority of the Parliament of Canada"—the Act of 1879 was not otherwise made generally applicable to the Grand Trunk Railway or to railways constructed under authority of the Parliament of Canada.

In 1886, upon the coming into force of the Revised Statutes of Canada, another Act, ch. 109, known as the Railway Act, was substituted for the previous general Railway Acts of the Dominion. By sec. 3 of that Act, part 1, containing the sections numbered from 4 to 39 inclusive, was made applicable "to every railway constructed or to be constructed under, the authority of any Act passed by the Parliament of Canada."—Part 2 was made applicable "to all railway companies and railways within the legislative authority of the Parliament of Canada, except Government railways"; and part 3 "to all railway companies operating a line or lines of railway in Canada, whether otherwise within the legislative authority of the Parliament of Canada or not." In sec. 16 (included in part 1) of that Act were embodied the

previous provisions respecting tolls, with the amendment made by the Act of 1883. The general Railway Act of the Province of Canada, C.S.C. ch 66, was not among the Acts repealed upon the coming into force of the Revised Statutes.

In 1888 another Act, known as the Railway Act, 51 Vict. ch. 29, was substituted for the R.S.C. ch. 109, which was then repealed. By sec. 2, sub-sec. (t) "the expression 'Special Act' means any Act under which the company has authority to construct or operate a railway, or which is enacted with special reference to such railway, and includes all such Acts."

By sec. 3, "This Act, subject to any express provisions of the special Act, and to the exception hereinafter mentioned, applies to all persons, companies and railways within the legislative authority of the Parliament of Canada, except Government railways."

By sec. 6, "If in any special Act it is provided that any provisions of any general Railway Act in force at the time of the passing of the special Act is excepted from incorporation therewith, or if the application of any such provision is extended, limited or qualified, the corresponding provision of this Act shall be excepted, extended, limited or qualified in like manner."

By sec. 223, "Subject to the provisions and restrictions in this and in the special Act contained, the company may, by by-laws, or the directors, if thereunto authorized by the by-laws, may, from time to time, fix and regulate the tolls to be demanded and taken for all passengers and goods transported upon the railway, or in steam vessels belonging to the company."

By sec. 227, "No tolls shall be levied or taken until the by-law fixing such tolls has been approved of by the Governor in Council, nor until after two weekly publications in the Canada Gazette of such by-law and of the Order in Council approving thereof; nor shall any company levy or collect any money for services as a common carrier except subject to the provisions of this Act."

By sec. 228, "Every by-law fixing and regulating tolls shall

be subject to revision by the Governor in Council, from time to time, after approval thereof; and after an Order in Council altering the tolls fixed and regulated by any by-law, has been twice published in the Canada Gazette, the tolls mentioned in such Order in Council shall be substituted for those mentioned in the by-law, so long as the Order in Council remains unrevo-
ked."

The Act of 1888 was repealed upon the coming into force of the Railway Act, 1903, which substituted the Board of Railway Commissioners for the Governor General in Council as the authority having jurisdiction to approve and revise the tolls of railway companies, and which made important changes in regard to railway tariffs. The following provisions of that Act are important:—

"3. This Act shall apply to all persons, companies and railways (other than Government railways) within the legislative authority of the Parliament of Canada, and shall be incorporated and construed, as one Act, with the Special Act, subject as herein provided."

"4. Any section of this Act may, by any Special Act passed by the Parliament of Canada, be excepted from incorporation therewith, or may thereby be extended, limited or qualified. It shall be sufficient, for the purposes of this section, to refer to any section of this Act by its number merely."

"5. If in any Special Act heretofore passed by the Parliament of Canada it is enacted that any provision of the General Railway Act in force at the time of the passing of such Special Act, is excepted from incorporation therewith, or if the application of any such provision is, by such Special Act, extended, limited or qualified, the corresponding provision of this Act shall be taken to be excepted, extended, limited or qualified, in like manner; and, unless otherwise expressly provided in this Act, where the provisions of this Act and of any Special Act passed by the Parliament of Canada relate to the same subject-matter, the provisions of the Special Act shall be taken to over-

ride the provisions of this Act in so far as is necessary to give effect to such Special Act."

"6. Where any railway, the construction or operation of which is authorized by a Special Act passed by the Legislature of any province, is declared, by any Special Act of the Parliament of Canada, to be a work for the general advantage of Canada, this Act shall apply to such railway, and to the company constructing or operating the same, to the exclusion of such of the provisions of the Special Act of the Provincial Legislature as are inconsistent with this Act, and in lieu of any General Railway Act of the Province."

"251. The company or the directors of the company, by by-law, or any such officer or officers of the company as are thereunto authorized by by-law of the company or directors, may from time to time prepare and issue tariffs of the tolls to be charged, as hereinafter provided, for all traffic carried by the company upon the railway, or in vessels, and may specify the persons to whom, the place where, and the manner in which, such tolls shall be paid.

2. All such by-laws shall be submitted to and approved by the Board.

3. The Board may approve such by-laws in whole or in part, or may change, alter or vary any of the provisions therein.

4. No tolls shall be charged by the company until a by-law authorizing the preparation and issue of tariffs of such tolls has been approved by the Board, nor shall the company charge, levy or collect any money for any services as a common carrier, except under the provisions of this Act."

"256. All tariff by-laws and tariffs of tolls shall be in such form, size and style, and give such information, particulars and details, as the Board may, by regulation, or in any case, prescribe."

"257. The Board may disallow any tariff or any portion thereof which it considers to be unjust or unreasonable or contrary to any of the provisions of this Act, and may require the

company, within a prescribed time, to substitute a tariff satisfactory to the Board in lieu thereof, or may prescribe other tolls in lieu of the tolls so disallowed, and may designate the date at which any tariff shall come into force.

2. Any tariff in force (except standard tariffs hereinafter mentioned) may, subject to disallowance or change by the Board, be amended or supplemented by the company, by tariffs, in accordance with the provisions of this Act."

" 263. The tariffs of tolls which the company shall be authorized to issue under this Act for the carriage of passengers between points on the railway shall be divided into two classes, namely:—

" The Maximum Mileage Tariff, herein referred to as the Standard Passenger Tariff;

" And Reduced Passenger Tariffs, herein referred to as Special Passenger Tariffs.

" 2. The Standard Passenger Tariff shall specify the maximum mileage tolls to be charged for passengers for all distances covered by the company's railway; such distances may be expressed in like manner as provided herein in respect of Standard Freight Tariffs.

" 3. Special Passenger Tariffs shall specify the toll or tolls to be charged by the company for passengers in every case where such tolls are lower than the tolls specified in the company's Standard Passenger Tariff."

" 264. A Standard Passenger Tariff shall be filed, approved and published in the same manner as required by this Act in the case of a Freight Standard Tariff.

" 2. Until the company files its Standard Passenger Tariff and such tariff is so approved and published in the Canada Gazette, no tolls shall be charged by the company.

" 3. When the provisions of this section have been complied with, and except in the case of Special Passenger Tariffs, the tolls in the Standard Passenger Tariff shall be the only tolls

which the company is authorized to charge for the carriage of passengers.”

“ 265. All Special Passenger Tariffs shall be filed by the company with the Board, and published as required by sec. 274, three days before any such tariff is intended to take effect, or within such time, or in such manner, as the Board, owing to the exigencies of competition or otherwise, may require.

“ The date of the issue and the date on which, and the period, if any, during which, any such tariff is intended to take effect, shall be specified thereon.

2. Upon any such tariff being so duly filed the company shall, until such tariff is superseded or is disallowed by the Board, charge the toll or tolls as specified therein, and such tariff shall supersede any preceding tariff or tariffs, or any portion or portions thereof, in so far as it reduces or advances the tolls therein, but until such tariff is so duly filed, no such toll or tolls shall be charged by the company.”

Section 214 required every railway company to furnish adequate and suitable accommodation for receiving, loading, carrying, unloading and delivering traffic, and to furnish and use all proper appliances, accommodation and means necessary therefor; and section 253 requires it to afford to all persons all reasonable and proper facilities for the receiving, forwarding and delivering of traffic. Section 214, also, gave to the Board power, where the required accommodation was not furnished, to order the company to furnish the same; and an amending Act, passed in 1906, 6 Edw. VII. ch. 42, sec. 23, gave the Board power to order that specific works be constructed or carried on, or specific steps, systems, or methods taken. Section 212, sub-section 2, of the Act of 1903, empowered the Board to make regulations “ providing for the protection and safety of the public, of property, and of the employees of the company with respect to the running and operation of trains by the company,” which provision was amended by the Act of 1906. Section 18, so as to authorize the Board to make regula-

tions "generally for the protection of property, and the protection, safety, accommodation and comfort of the public and the employees of the company, in the running and operation of trains by the company."

All of the before mentioned provisions of the Act of 1903, with the amendments, are embodied in the present Railway Act, R. S. C. ch. 37.

It appears to me that neither the Act of 1868, nor that of 1879, nor part 1 of the Act in the Revised Statutes, nor the amendments of either (except in some particulars not material to the present application) applied to the Grand Trunk Railway Company. By the terms of the principal Acts, they were to apply only to railways constructed under the authority of an Act passed by the Parliament of Canada; and I agree with Mr. Nesbitt's contention that the Parliament of the former Province of Canada was not included. Some amendments extended the application of particular provisions. See 38 Vict. ch. 24, sec. 4, (1875), and 46 Vict. ch. 24, sec. 12 (1883). This view appears to be supported by the decisions in *Scott v. Great Western Ry. Co.*, 23 U. C. C. P. 182; *Allan v. Great Western Ry. Co.*, 33 U. C. R. 483; *Re St. Catharines & Niagara Central Ry. Co. & Barbeau*, 15 O. R. 583; *Toronto Belt Line Ry. Co. v. Lander*, 19 O.R. 607; and by the language of Burton, J., in *Bowen v. Canada Southern Ry. Co.*, 14 A. R. 1.

The Act of 1888 was, by its terms, applicable to all persons, companies, and railways within the legislative authority of the Parliament of Canada, except government railways. These terms clearly included the Grand Trunk Ry. Company and its lines of railway; but this was "subject to any express provisions of the special Act"; and section 6 further indicated that the special Act was to govern. Further, section 223, which authorized the company or the directors to fix and regulate the tolls, did so "subject to the provisions and restrictions in this and in the special Act contained."

What I have said is sufficient to dispose of the contention

that the amending Act of 1883 affected the limitation imposed by the company's special Act; but it is to be noticed that the powers of the company were, under that Act, to be exercised "subject to the provisions and limitations hereinafter and in their special Act contained."

While not material to the construction of the amendment, it is interesting to note that, as shewn by the Hansard report of the discussion in Parliament, the amendment of 1883 was introduced by Mr. McCarthy, M.P., for the purpose of making the provision against discrimination more clear. See Hansard Vol. II. pp. 1295 and 1296.

In my opinion, therefore, the clause requiring the running of third class carriages and limiting third class fares was not affected by any legislation prior to the Act of 1903.

As has been said, the provisions of the special Act have not been expressly repealed. None of the enactments in the Railway Act, 1903, or in the present Railway Act, are explicitly inconsistent with those provisions. The contention on the part of the railway company is that, in effect, those enactments, and particularly the portions relating to tolls and those giving the Board jurisdiction respecting the accommodation, etc., to be furnished by the company, are so inconsistent as impliedly to repeal the provisions of the special Act.

"If two inconsistent Acts be passed at different times, the last is to be obeyed; and if obedience cannot be observed without derogating from the first, it is the first which must give way." Per Lord Langdale, M.R., in *Dean of Ely v. Bliss*, 5 Beav. at p. 582. But a "repeal by implication is never to be favoured." Per Field, J., in *Dobbs v. Grand Junction Ry. Co.*, 9 Q. B. D. at p. 158.

"We ought not to hold a sufficient Act repealed, not expressly as it might have been, but by implication, without some strong reason." Per Lord Bramwell, in *Great Western Ry. Co. v. Swindon and Cheltenham Ry. Co.*, 9 App. Cas. at p. 809.

"A later Act of Parliament hath never been construed to

repeal a prior Act, without words of repeal, unless there be a contrariety and repugnancy between them, or at least some notice taken of the former law in the subsequent one, so as to indicate an intention in the law-makers to repeal it." Per Lord Hardwicke, L.C., in *Middleton v. Crofts*, 2 Atk. 650.

"The Court must be satisfied that the two enactments are inconsistent before they can from the language of the later imply a repeal of an express prior enactment." Per Byles, J., in *Conservators of the Thames v. Hall*, 3 Ch. D., at p. 419; and in the same case Keating, J., said (p. 420): "I entirely agree with my Brother Byles, that, before we come to that conclusion, we are bound to satisfy ourselves that it is a necessary implication."

"When the repeal is not express, the burden is on those who assert that there is an implied repeal to shew that the two statutes cannot stand consistently the one with the other." Per Chitty, J., in *Lybbe v. Hart*, 29 Ch. D. 8.

The intention to repeal must appear even more strongly where the first provision is contained in a statute of a private or special nature, in which case the maxim *generalia specialibus non derogant* usually prevails. "A later statute in the affirmative shall not take away a former Act, and *eo potior* if the former be particular and the latter be general." Gregory's Case, 6 Rep. 19 b.

"The law will not allow the exposition to revoke or alter, by construction of *general* words, any *particular* statute where the words may have their proper operation without it. *Lyn v. Wyn*, 2 Bridg., C.P. 127.

"The general principle is that a *general* Act is not to be construed to repeal a previous *particular* Act unless there is some express reference to the previous legislation on the subject or unless there is a necessary inconsistency in the two Acts standing together." Per Bovill, C.J., in *Thorpe v. Adams*, L. R. 6 C. P., at p. 135.

"Unless two Acts are so plainly repugnant to each other

that effect cannot be given to both at the same time, a repeal will not be implied, and special Acts are not repealed by general Acts unless there is some express reference to the previous legislation or unless there is a necessary inconsistency to the two Acts standing together." Per A. L. Smith, J., in *Kutner v. Phillips* (1891), 2 Q. B., 267.

"It is a fundamental rule in the construction of statutes that a subsequent statute in general terms is not to repeal a previous particular statute unless there are express words to indicate that such is the intention, or unless such an intention appears by necessary implication." Per Bovill, C.J., in *Regina v. Champneys*, L. R. 6 C. P. at p. 394.

"In order to shew that a particular Act is repealed by a general Act by implication, it is not enough to shew that the particular Act may have become useless or futile, that is to say, that the subject-matter of the particular Act comes within the terms of the general Act; it must be shewn, as it seems to me, that there are enactments in the general Act, when rightly construed, inconsistent with the maintenance of the particular Act." Per Brett, J., in *Regina v. Champneys*, *supra*, at p. 404.

"Now if anything be certain it is this, that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered or derogated from merely by force of such general words, without any indication of a particular intention to do so." Per Lord Selborne, L.C., in *Seward v. Vera Cruz*, 10 App. Cas. at p. 68.

See, also, the enunciation of similar principles by Sir W. Page Wood, V.C., in *Fitzgerald v. Champneys*, 2 J. & H. at pp. 53-61.

But all these statements admit that, if the intention of Parliament to that effect sufficiently appears, the later Act should be construed as repealing or varying the former Act, whether special or general, and several cases have been cited in which

the Courts have adopted such construction. In most of these the circumstances and the nature of the enactments vary so much from those with which we have now to deal, that they do not appear to afford us any material assistance.

In these cases the principles before stated are not contravened; in some, they are expressly acceded to. Usually, the decision turned upon the view taken by the Court of particular language or of the scope and intention of the legislation as understood by the Court. I will cite from but two of them. In *Daw v. Metropolitan Board of Works*, 12 C.B.N.S. 161, Willes, J., said, "The rule of construction of Acts of Parliament as laid down by Vice Chancellor Wood in *The London and Brighton Railway Company v. Metropolitan Board of Works*, 26 L.J. Ch. 164, is no doubt a very wholesome one. A subsequent general enactment will not derogate from a prior special enactment. When, as the learned Judge says, the legislature has had a special case in view, and has specially legislated upon it, the inference necessary is that it does not intend by a subsequent general enactment not referring to the former, to deal with those matters which have already been specially provided for. The rule *generalia specialibus non derogant* is properly applicable to such a case . . . In the present case, however, the rule cannot apply. The powers conferred by the two are substantially, if not strictly, the same. So soon as you find that the legislature is dealing with the same subject-matter in both Acts, so far as the later statute derogates from and is inconsistent with the earlier one, you are under the necessity of saying that the legislature did intend in the later statute to deal with the very case to which the former statute applied"; and in *Great Central Gas Consumers Company v. Clarke*, 11 C.B.N.S. 814, Keating, J., said: "I agree that, where we find in an Act of Parliament a prohibition against a public company exacting more than a prescribed rate, we should require a very clear enactment in a subsequent Act to remove the restriction. But it is equally clear that, if we find in a later Act of Parliament provisions which are utterly inconsistent with those of an earlier Act, we are bound to give effect to the later pro-

visions.” And in the same case, 11 C.B.N.S. 838, Pollock, C.B., said, “Although that section is not in terms repealed, yet it becomes a clause in a private Act of Parliament quite inconsistent with a clause in a subsequent public Act of Parliament. That is sufficient to get rid of the clause in the private Act. Looking at the 19th section of the general Act, we think it is impossible to read it otherwise than as repealing the 24th section of the private Act. We are bound as well by the plain words of the Act as by the general scope and object of it, and also by the justice of the case.”

By section 3 of the Act of 1903, that Act was to be incorporated with and construed as one Act with the special Act, subject as in the general Act provided; and by section 5, in the event of inconsistency between the general Act and any special Act passed by the Parliament of Canada relating to the same subject-matter, the provisions of the special Act were to be taken to over-ride the provisions of the general Act in so far as should be necessary to give effect to the special Act. These provisions are combined in section 3 of the present Railway Act. This would settle the matter if the special Act had been one passed by the Parliament of Canada, in which case, although earlier than the general Act, the provisions of the special Act would prevail. But the portion of the Grand Trunk Railway to which the present application refers was constructed under a special Act of the late Province of Canada. I have some doubt whether section 6 of the Act of 1903, and the similar section of the present Railway Act, under which the general Act is to apply to the exclusion of such of the provisions of a special Act of a provincial legislature as are inconsistent with the general Act, were intended to cover the case of a special Act passed by the Parliament of a Province before the Union. The definition of the terms “Legislature of any Province,” and “Provincial legislature,” in section 2, sub-section (r) of the Act of 1903, and section 2, sub-section 20, of the present Act, is probably wide enough to include such parliaments; and the Grand Trunk Railway was declared by an Act of the Parliament of Canada to be a work for the general advantage of

Canada. That declaration was included in an Act amending the general Railway Act, which, though referring specially to the Grand Trunk Railway and other named railways, may not come within the definition of a "special Act." The Grand Trunk Railway was a railway connecting one Province with another, and thus became *ipso facto*, upon the formation of the Dominion, subject to the legislative authority of the Parliament of Canada without a declaration that it was a work for the general advantage of Canada. Section 6 was probably intended to apply to railways constructed under special Acts of Provincial Legislatures passed after Confederation.

Possibly, however, this may not be important, since section 6 embodies the most important of the before-mentioned principles, that the prior special Act is repealed or affected by the general Act only where there is inconsistency between them; and I take it that, under either view, the burden is upon the party asserting it to point out the inconsistency, and that this should be made clear.

The clause in the special Act is two-fold; it limits the fares for different classes of passengers, and it requires the running of third-class carriages. Necessarily, under the latter portion, there was some obligation upon the company to furnish reasonable accommodation; some obligation to give some attention to the comfort and convenience of third-class passengers, even though this accommodation and attention should not be of the same character as required for the other classes. The legislation requiring the furnishing of adequate and suitable accommodation, and the affording of reasonable and proper facilities, could certainly not effect a repeal of the provision for running third-class carriages, nor, in my opinion, can the legislation empowering the Board of Railway Commissioners to make regulations providing for the protection, safety, accommodation and comfort of the public. Whatever the obligations under the present Act or the former Acts, these could not satisfactorily be enforced by the ordinary methods in the ordinary tribunals. The Board of Railway Commissioners was created to be the tribunal for the set-

ting of these and other matters affecting railways and railway companies. It does not appear to me that the creation of such a tribunal was in any way inconsistent with the continuance of the obligation imposed by the special Act, or could effect its repeal or evidence an intention of Parliament that the obligation should be no longer effective.

Under the Railway Clauses Consolidation Act and all the succeeding legislation, down to the Act of 1903, railway tolls were subject to the approval of, and to be altered by, the Governor in Council. This limitation upon the company's powers was embodied in the special Act by reference to the general Act. The jurisdiction of the Governor in Council could exist, therefore, consistently with the limitation as to fares imposed by the special Act, and it does not appear to me that the substitution of the Board of Railway Commissioners as the body which is to approve, and which has the jurisdiction to alter, railway tolls, makes any change in this respect. Under the former legislation, all the railway tolls required the approval of the Governor in Council; under the present, it is only the standard or maximum tariffs which must be approved by the Board; and railway companies are authorized to make special tariffs imposing tolls lower than those in the standard tariffs. The practice has been for the companies to obtain approval of standard passenger tariffs, not distinguishing between classes, and to provide for second-class fares by special tariffs. Third-class fares could be provided for in the same way. I do not think that the provisions requiring special tariffs are necessarily inconsistent with the limitations imposed by the special Act, or that they are sufficient to indicate the intention of Parliament that the company, in framing special tariffs, was to be free from such limitations.

I am not informed whether the third class carriages were at any time used upon the company's railway. To my mind it is clear that the obligation to use them, and to carry at fares limited as in the special Act, continued up to the coming into force of the Act of 1903. I am unable to find in the subsequent legislation any sufficient indication of the intention of Parliament to

abolish the system originally imposed upon the company, as having become obsolete or unnecessary.

The imposition of this system was one of the terms and conditions upon which the company was granted its franchise, and it should not readily be presumed that Parliament intended to relieve the company from such terms and conditions.

The application is limited to the portion of the Grand Trunk Railway between Toronto and Montreal, and it is unnecessary to consider whether the obligation ever extended to any other portion of the company's lines.

In my opinion, there should be an order requiring the company to run every day, throughout the length of its line between Montreal and Toronto, at least one train having in it third class carriages, and forbidding it to charge third class passengers fares at more than two cents per mile, and directing it to amend its special tariffs accordingly.

The operation of this order, however, should be stayed a sufficient time to enable the company to appeal.

REDUCTION OF RATES—REBATE—REFUND.

[CANADA.]

[BOARD OF RAILWAY COMMISSIONERS.]

DOMINION CONCRETE CO. v. CANADIAN PACIFIC RY. CO.

Reduction of rates on concrete blocks—Standard tariffs—Railway Act, ch. 37, R.S.C. 1906, secs. 323, 327, 401—Powers of Board—Retroactive alteration of tariff—Rebate and refund of tolls already charged.

The Dominion Concrete Company complained to the Board that there was an unjust discrimination in favour of bricks as against concrete blocks in the freight rates charged.

After these rates had been satisfactorily adjusted and those on concrete blocks reduced the company applied to the Board for a refund of the difference between the higher and the reduced rate.

Held, that under sections 323, 327, and 401 of ch. 37, R.S.C. 1906, the Board has no power to make a retroactive alteration in a tariff and grant rebates and refunds of tolls which have been charged.

This company applied for an investigation by the Board into the matter of the Canadian Pacific Railway Company's rate of 12 cents per hundred pounds on concrete blocks from Kemptville, Ontario, to Graham Station, a distance of 107 miles, as against a rate of 6½ cents per hundred pounds on brick, and alleging an unjust discrimination in favour of the latter commodity and against the former.

This matter was taken up by the Chief Traffic Officer of the Board, and after considerable correspondence with the railway company the rate on concrete was reduced and made satisfactory to the complainants. After the lower rate had gone into effect complaints claimed to be entitled to a refund of the difference between the higher and the reduced rate. The railway company refused to recognize any such claim and the complainants applied to the Board for an Order directing a refund.

March 5, 1907. Judgment, Chief Commissioner.

Under the Railway Act a railway company is required to obtain approval of what are called Standard Tariffs, specifying the maximum mileage rates which the company is authorized to charge and, upon approval of such tariffs, the company is entitled to charge the rates set out therein, unless it files special tariffs giving lower rates than those in the standard tariff; and section 327 of the Railway Act provides that, when a railway company's standard freight tariff has been approved and published, the tolls specified therein—except where other tolls are provided for by special or competitive tariffs—are the only tolls which the company is authorized to charge for the carriage of goods; and, by section 401 of the Railway Act, “any person or company, or any officer or agent of any company, (a) who shall offer, grant, or give, or shall solicit, accept or receive any rebate, concession, or discrimination in respect of the transportation of any traffic by the company, whereby any such traffic shall, by any device whatsoever, be transported at a less rate than that named in the tariffs then in force

shall for each offence be liable to a penalty not exceeding one thousand dollars and not less than one hundred dollars." The authority of the Board to deal with tolls and tariffs, as set out in section 323 of the Railway Act, is as follows: "The Board may disallow any tariff or any portion thereof which it considers to be unjust or unreasonable, or contrary to any of the provisions of this Act, and may require the company, within a prescribed time, to substitute a tariff satisfactory to the Board in lieu thereof, or may prescribe other tolls in lieu of the tolls so disallowed.

" 2. The Board may designate the date at which any tariff shall come into force."

Held, that this does not empower the Board to make a retroactive alteration in a tariff which is not contrary to any of the provisions of the Railway Act, so as to apply the alteration to past transactions; and that the railway company is not entitled to make rebates from tolls which have been charged in accordance with the tariffs lawfully existing when the transportation took place.

Held, further, that the Board has no authority to direct the Canadian Pacific Railway Company to refund any portion of the tolls charged by it under the tariffs existing before the 20th March, 1906.

A later application was made by complainants against this ruling of the Board, and it was urged that, as the Board had power to designate the date at which any tariff should come into force, this could be done so as to give the same a retroactive effect.

Held, Chief Commissioner, March 20, 1907, that the power of the Board to designate the date at which a tariff shall come into force does not enable the Board to give such tariffs a retroactive effect, and to make them applicable to prior shipments.

DIGEST OF CASES.

AGREEMENT.

Interpretation of Agreement — Controllable Freight.] — By an agreement providing that the defendants should ship by the lines of the plaintiffs their controllable freight for points reached by the lines of the plaintiffs and their connections to the amount of \$35,000 per annum, if the controllable freight amounted to that, if not, then all of it.

The defendants contended that the plaintiffs should supply them with cars for the carriage of the freight according to the custom or practice alleged to be usual in the case of a local line bringing freight to a trunk line consigned to a point on the trunk line or reached by its connections:—

Held, restoring the judgment of Boyd, C., at the trial and reversing the Court of Appeal, MacLennan, J.A., dissenting.

1. That "controllable freight" means business, that is goods, which the shipper has not himself directed to be carried by a particular line or route to its destination.

2. That the alleged practice to supply cars was not to be imported into the special contract between the plaintiffs and defendants.

3. That the contract was plain, certain and unambiguous both on its face and when applied to the subject of it for fulfilment and execution, and its meaning was not rendered uncertain by anything extrinsic; and the evidence that the plaintiffs' officers for a time acted upon the defendants' understanding of the contract would not affect the legal construction of it.

4. That the plaintiffs were entitled to a reference to ascertain the amount received for any "controllable freight" shipped by the defendants contrary to the terms of the agreement. *Michigan Central R.W. Co. v. Lake Erie & Detroit River R.W. Co.*, 83.

Railway Crossing—Interlocking Appliances—Cost of—Power of Board to Interpret Agreement.] — See RAILWAY CROSSING, 1.

Farm Crossing—Temporary Road—Dedication—Right of Way.]—See HIGHWAYS, 1.

Municipality—Railway Aid—Description of Lands—Interpretation.] — See EXPROPRIATION, 2.

ANIMALS.

See FENCES.

Defective Fences—Consent of Owner.]—See FENCES, 1, 2, 3.

APPEAL.

Supreme Court—Extending Time—Jurisdiction—Evidence.]—See TRESPASS, 2.

Railway Commission—Jurisdiction—Supreme Court.]—See INTERCHANGE OF TRAFFIC.

Award—Choice of Forum—Curia Designata.]—See EXPROPRIATION, 8.

APPEAL FROM AWARD.

Barrister—Arbitrator—Affidavit—Examination—Evidence—Value of Hotel Property.]—See ARBITRATION, 3.

ARBITRATION.

1. *Arbitration and Award—Motion to set aside award—Misconduct of Arbitrators—Gross Undervaluation of Mining Claim in Question—Interested Motives Alleged Against Arbitrators—Evidence—Disproof of Charges—Railway Act, 1903, secs. 164, 168, sub-sec. 3—Payment out of Court.*]—The Court

will not interfere to set aside an award unless corruption, partiality, misconduct or irregularity is distinctly proved against the arbitrators, and mere suspicion is not sufficient; or unless the sum awarded is so grossly and scandalously inadequate as to shock one's sense of justice.

The plaintiff having made an application under sub-section 3 of section 168 of the Railway Act, 1903, to set aside the award of the majority of the arbitrators on the ground that it was unjust, improper, unreasonable and grossly and scandalously inadequate and against the weight of evidence, also, that no reasons were given for the amount of the award:—

Held, (1) That there was no evidence which would warrant a finding of corruption, partiality or irregularity on the part of the majority of the arbitrators or that the amount of the award was grossly and scandalously inadequate.

(2) Under section 164 arbitrators are not bound to give reasons for their conclusions though it would be better to do so. *Morley v. Klondike Mines R.W. Co.*, 183.

2. *Arbitration and Award—Motion to Set Aside Award—Misconduct of Arbitrators—Gross Undervaluation of Mining Claim in Question—Interested*

Motives Alleged Against Arbitrators — Evidence — Disproof of Charges—Railway Act—Payment out of Court.]—Harrigan v. Klondike Mines R.W. Co., 193.

*3. Expropriation of Land—Award—Appeal From—Barrister — Arbitrator — Affidavit by — Examination on Motion—Evidence on Arbitration — Hotel Property—Adjacent to Railway —Right of Company to Fence off Railway Premises—Effect of —Goodwill—License—Value of —Interest.]—*There is no objection to an arbitrator who is a barrister and probably also a solicitor making an affidavit shewing how the amount found by the arbitrators was made up for use on an appeal from an award under the Dominion Railway Act, 1903, section 137; and it is therefore properly receivable on such appeal, as is also the evidence of an arbitrator given on his examination as a witness on a pending motion.

Where the land taken consisted of an hotel property, an allowance was properly made for the loss sustained by the owner for the disturbance of his business and anticipated profits by reason of the expropriation, notwithstanding by the fencing off of the railway property therefrom, which the company had the right to do, the hotel property might have been ren-

dered valueless as such, but which right the company had never attempted to exercise and presumably never would have exercised.

The value of the license of an hotel is also a proper subject of allowance, though merely a personal right, and the renewal thereof, though reasonably probable, is not absolutely certain.

Interest on the amount of compensation awarded is properly allowable from the date of the taking of the land, which in this case was the filing of the plan shewing the land expropriated, and the order of the Railway Commission authorizing the taking. *Re Cavanagh and Canada Atlantic R.W. Co., 395.*

Lands Taken for Railway—Authority of Arbitrator—Absence of Notice of Expropriation —Submission to Arbitration.]—See EXPROPRIATION, 3, 4.

ASSIGNMENT OF CHOSE IN ACTION.

Damages—Assignability of.]—See DAMAGES.

AWARD.

Lands Taken for Railway—Authority of Arbitrator—Ab-

sence of Notice of Expropriation.]—See EXPROPRIATION, 3, 4.

Appeal From — Barrister — Arbitrator — Affidavit by — Examination of — Evidence — Hotel Property — Value adjacent to Railway — Goodwill — License — Interest.]—See ARBITRATION, 3.

Appeal — Choice of Forum — Curia Designata.]—See EXPROPRIATION, 8.

Motion to Set Aside — Misconduct of Arbitrators — Interest — Gross Undervaluation — Mining Claim — Evidence — Payment out of Court.]—See ARBITRATION, 2.

BILL OF LADING.

Notice of Claim — Negligence — Approval of Condition.]—See CONDITION LIMITING LIABILITY.

BRAKES.

Work Train — Necessity for Air Brakes — Railway Act, 1903, sec. 211 — Liability at Common Law.]—See NEGLIGENCE, 8.

BRANCH LINES.

Provincial Railway — Authority of the Board — Railway Act, 1903, sec. 7.]—Bertram & Sons

applied to the Board for an order directing the Hamilton and Dundas Street Ry. Co. (incorporated by the Legislature of the Province of Ontario) to construct and maintain a siding from their railway to the premises of the applicants.

Held, that the application must be refused, as the Board had no jurisdiction over a provincial railway, and no power to make an order for the construction of a siding by it. *Bertram & Sons v. Hamilton and Dundas Street R.W. Co.*, 158.

Interchange of Traffic — Tolls — Continuous Line — Compensation for Use of Another Railway's Terminal Facilities.]—See INTERCHANGE OF TRAFFIC.

Street Railway — Operation Along Highway — Leave of Municipality.] — See HIGHWAY CROSSING, 1.

BRIDGE.

Animals Not Killed by Trains or Engines — Fall From Bridge — Defective Fences.] — See FENCES, 7.

CARRIER.

Perishable Goods — Condition Limiting Liability — Gross Neg-

ligence — Notice of Claim.]
—See EXPRESS COMPANY.

CASES.

DISCUSSED, FOLLOWED OR APPROVED.

Bennett v. Grand Trunk R. W. Co., 2 O.L.R. 425, p. 356.

Bernina, The, 12 P.D. 58, p. 229.

Canada Atlantic R.W. Co. v. Henderson, 29 S.C.R. 632, p. 229.

Canada Southern R.W. Co. v. Jackson, 12 S.C.R. 316, p. 229.

Canadian Pacific R.W. Co. v. Notre Dame (1899), A.C. 367, p. 421.

Canadian Pacific R.W. Co. v. Roy (1902), A.C. 220, p. 356.

Coyle v. Great Northern R.W. Co., L.R. 20 Ir. 409, p. 229.

Deyo v. Kingston & Pembroke R.W. Co., 8 O.L.R. 588, p. 444.

Grand Trunk R.W. Co. v. McMillan, 16 S.C.R. 543, p. 411.

Great Western R.W. Co. v. Braid, 1 Moo. P.C. (N.S.) 101, p. 54.

Green v. Toronto R.W. Co., 26 O.R. 319, p. 229.

London & Western Trusts Co. v. Lake Erie, etc., R.W. Co., 5 Can. Ry. Cas. 364, p. 229.

Madden v. Nelson & Fort Sheppard R.W. Co. (1899), A.C. 626, p. 421.

Mason v. Grand Trunk R.W. Co., 37 U.C.R. 163, p. 411.

Ontario Lands & Oil Co. v. Canada Southern R.W. Co., 1 Can. Ry. Cas. 178, p. 133.

Radley v. London & North Western R.W. Co., 1 App. Cas. 754, p. 261.

Scott v. Dublin & Wicklow R.W. Co., 11 Ir. C.L.R. 377, p. 261.

Toronto R.W. Co. v. Toronto, 37 S.C.R. 430, p. 381.

CERTIORARI.

Prairie Fires Ordinance — Conviction by Magistrates — Review by Court.]—See CONSTITUTIONAL LAW, 3.

CHOSE IN ACTION.

Assignment of — Damages — Ontario Judicature Act, sec. 58, sub-sec. 5.]—See DAMAGES.

COMPENSATION.

Hotel — Goodwill — License — Proximity to Railway — Interest.]—See **ARBITRATION**, 3.

Lands Taken for Railway—Municipality — Description of Lands—Plans.]—See **EXPROPRIATION**, 1, 2.

Placer Mines—Open Mines—Interference with by Railway—Deposit of Waste—Injunction.] See **EXPROPRIATION**, 10.

Railway Lands — Expropriation—Powers of Board.]—See **EXPROPRIATION**, 6.

Use by One Railway of Terminal Facilities of Another—Interchange of Traffic—Tolls.]—See **INTERCHANGE OF TRAFFIC**.

CONDITION LIMITING LIABILITY.

Negligence — Condition Requiring Notice of Claim for Damage to Goods—Railway Act, 1903; sec. 214, sub-sec. 3; sec. 275.]—A condition in a shipping bill providing that there should be no claim for damages to goods shipped over a railway unless notice in writing and the particulars of the claim are given within thirty-six hours after delivery, if it has been approved by order or regulation

of the Board of Railway Commissioners for Canada, under section 275 of the Railway Act, 1903, is binding upon the shipper, even if negligence on the part of the railway company is proved, notwithstanding the language of sub-section 3 of section 214 of the Act, enacting that "subject to the Act" the company shall not be relieved from an action by any notice, condition or declaration, if the damage arises from any negligence or omission of the company or of its servants, as both sections of the Act, must be read together. *Grand Trunk R.W. Co. v. McMillan* (1889), 16 S.C.R. 543, and *Mason v. Grand Trunk R.W. Co.* (1873), 37 U.C.R. 163, followed. *Hayward v. Canadian Northern R.W. Co.*, 411.

Carrier—Gross Negligence—Perishable Goods — Delay in Forwarding—Notice of Claim.]—See **EXPRESS COMPANY**.

CONFLICTING LAWS.

Dominion Railway — Prairie Fires Ordinance—Fires—Railway Act, 1903, secs. 25(e) and 239.] — See **CONSTITUTIONAL LAW**, 3.

CONFLICT OF LAWS.

See **CONSTITUTIONAL LAW**.

CONNECTIONS.

Replacing Sidings—Jurisdiction of Board—Railway Act, 1903, secs. 176, 214, 253.]—See TRAFFIC ACCOMMODATION.

CONSTITUTIONAL LAW.

1. *Mechanics' Lien Act—Railways—Dominion Act—Railway Act, 1903, sec. 240.]—The Mechanics' and Wage Earners' Lien Act, R.S.O. 1897, ch. 153, does not apply to a railway company incorporated under a Dominion Act and declared thereby to be a company incorporated for the general advantage of Canada. Crawford v. Tilden, 300.*

2. *Mechanics' Lien Act—Dominion Railway.]—A lien under the Mechanics' and Wage Earners' Lien Act, R.S.O. 1897, ch. 153, cannot be enforced against the railway of a company incorporated under a Dominion Act, and declared thereby to be a company incorporated for the general advantage of Canada.*

Decision of a Divisional Court affirmed. *Crawford v. Tilden*, 437.

3. *Prairie Fires Ordinance—Intra vires—Application to Dominion Railways—Conflict with Dominion Legislation—Condition of Ordinance—Magis-*

trates' Convictions—Evidence before Magistrate—Consideration by Court on Certiorari—Jurisdiction to Review—Negligence—Railway Act, 1903, secs. 25(e), 239.]—1. The provisions of the Prairie Fires Ordinance imposing penalties upon railway companies governed by the Dominion Railway Act for kindling fires and letting it run at large in the operation of locomotive steam engines on their railway are valid: Rex v. Canadian Pacific R.W. Co., 1 West. L.R. 89, followed.

2. Where provincial legislation imposing penalties for failing to observe the precautions to protect does not conflict with Dominion legislation upon the same subject the Provincial legislation is not rendered inoperative by such Dominion legislation.

3. Where Provincial regulations do not attempt to interfere with the structure of authorized works of the railway, but merely require the removal of weeds or some alteration in its surface in order to prevent injury to other property, such legislation is not invalid, provided the management of the company's business as a railway and the railway works themselves are not interfered with: *Madden v. Nelson and Fort Sheppard R.W. Co.* (1899), A.C. 626, discussed: *Canadian Pacific R.W. Co. v.*

Notre Dame (1899), A.C. 367, followed. *Rex v. Canadian Pacific R.W. Co.*, 421.

CONTRIBUTORY NEGLIGENCE.

Infant—Coasting on Streets—By-law—Hand Car—Warning at Crossing—Negligence.]—See HIGHWAY CROSSING, 2.

Passenger — Alighting from and passing behind Car—Duty to sound Gong—Jury—Costs—Discretion—Appeal.]—See NEGLIGENCE, 9.

Highway Crossings — Warnings — “Look and Listen” — Findings of Jury.]—See NEGLIGENCE, 2.

Yard Engine—Negligence of Crew—Failure of Deceased to Look — Absence of Signals.]—See NEGLIGENCE, 3.

Street Railway—Passing behind Car—Snow on Track—Bicycle.]—See NEGLIGENCE, 5.

“Ultimate Negligence” — Street Railway—Rule of Company—Nonsuit — Misdirection.]—See NEGLIGENCE, 7.

Work Train—Disobedience of Deceased to Rules—Volenti non fit Injuria.]—See NEGLIGENCE, 8.

CONTROLLABLE FREIGHT.

Interpretation of Agreement.]—See AGREEMENT.

CONVICTION.

Officer of Railway—Offence of Company—Criminal Code, 55 and 56 Vict. (Dom.), sec. 138 —16 Vict. ch. 37, sec. 3(C.)—Third Class Fares.]—See CRIMINAL LAW.

COSTS.

Nonsuit—Refusal of Costs on Appeal—Discretion.]—See NEGLIGENCE, 9.

CRIMINAL LAW.

Conviction—Officer of Railway Company—Offence of the Company — Criminal Code, 55 and 56 Vict. ch. 29, sec. 138 (D.)—16 Vict. ch. 37, sec. 3 (C.).]—The defendant who was second vice-president and the general manager of a railway company was convicted by a police magistrate under section 138 of the Criminal Code of an offence against section 3 of 16 Vict. ch. 37 (C.), on the following findings: that the company had not during the year 1906 fixed or issued a tariff of fares or charges, payable by each third class passenger on any train on said railway for each mile travelled; that the company had

not during that time permitted a third class passenger to travel by any train on said railway at the fare or charge of one penny currency for each mile travelled; and that the said company had not, during that time provided that at least one train having in it third class carriages should run each day to from being part of the said railway:—

Held, that the conviction of the defendant for the omission of the company was bad.

Held, also, that in any event the operation of section 138 of the Criminal Code was in this case excluded by the existence of a penalty for the offence under section 294 of the Railway Act, 1903. *Re v. Hays*, 480.

Prairie Fires Ordinance—Conviction—Validity—Review on Certiorari—Constitutional Law.]—See CONSTITUTIONAL LAW, 3.

DAMAGES.

Assignment of Claim for—Chose in Action—Assignability of—Ontario Judicature Act, sec. 58, sub-sec. 5.]—The plaintiff brought this action for damages for personal injuries sustained by his being run down by a car of the defendants, and for the killing of his master's horse which he was riding at the time,

and in respect to which he claimed under assignment from his master:—

Held, that the action was properly dismissed as to the latter claim upon the ground that it was not an assignable chose in action. *McCormick v. Toronto R.W. Co.*, 474.

Illegal Entry on Land—Cutting Trees and Taking Gravel—Absence of Notice to Expropriate.]—See EXPROPRIATION, 3, 4.

Negligence—Verdict for more than \$5,000—Findings of Jury.]—See FIRES, 1.

DELAY.

Carrier—Perishable Goods—Gross Negligence—Condition Limiting Liability.]—See EXPRESS COMPANY.

DIVERSION.

Road—Taking Gravel—Term of Years.]—See HIGHWAY, 2.

EASEMENT.

Expropriation—Insufficient Notice—Immediate Possession.]—See EXPROPRIATION, 5.

EVIDENCE.

Defective Fences—Knowledge of Owner—Burden of Proof—

Railway Act, 1903, sec. 237, sub-sec. 4.]—See FENCES, 5, 6.

Expropriation—Valuation of Lands—Hotel Property—License—Affidavit of Arbitrator—Examination.]—See ARBITRATION, 3.

Roadbed—Latent Defect—Vis Major—Burden of Proof.]—See NEGLIGENCE, 1.

Negligence—Absence of Care—Engine Driver and Trainmen—Failure to Call as Witnesses—Inferences.]—See NEGLIGENCE, 3.

Train “Behind Time”—Evidence of Negligence—Railway Act, 1903, sec. 215.]—See NEGLIGENCE, 4.

EXPRESS COMPANY.

Carriers—Express Company—Contract to Forward Perishable Goods—Delay in Transmission—Gross Negligence—Railway Company—Agent or Servant—Notice of Claim for Damage to Goods—“At this Office.”]—The defendants undertook to forward a consignment of fish from Selkirk, Manitoba, to Toronto, Ontario, subject to certain conditions expressed in the contract:—

Held, that the defendants’ engagement implied that a safe

and rapid transit would be furnished for the whole distance, and that contract was broken when the perishable goods were transferred to a freight train at Winnipeg, by which delivery was delayed; and this was negligence for which the defendants were liable as common carriers.

A special condition that the defendants should not be liable for loss or damage, unless it should be proved to have occurred from the gross negligence of the defendants or their servants did not avail the defendants, because the railway companies employed by the defendants for the transaction of their business were to be regarded as the defendants’ servants, and the negligence was to be accounted gross negligence.

Another condition was that a claim for loss or damage should be presented to the defendants in writing “at this office”:—

Held, that presentation at the head office of the defendants satisfied this requirement.

Judgment of Clute, J., affirmed. James v. Dominion Express Co., 309.

EXPROPRIATION.

See ARBITRATION.

1. Municipal Corporation—Liability to Pay for Lands taken for Railway Purposes—

Filing Plan—Mistake as to Immaterial Matter.] — Under the Act incorporating the Inverness and Richmond Railway Co., and amending Acts, it was provided that lands required by the company for its right of way, station grounds, etc., should be vested in the company upon the filing of a plan thereof, as if the same were deeded to the company, and that the owners of the same should only have recourse for the lands taken against the municipality of the county.

By an Act passed in 1903, ch. 97, a resolution of the municipal council, adopted for the express purpose of settling what land the municipality was to pay for, was confirmed.

Lands of the plaintiff were taken for the purposes of the company, and a plan filed indicating the land taken, and shewing it to be land which was the subject of an award in plaintiff's favour under the Act:—

Held, that the land, being clearly marked and indicated, became the property of the company on the filing of the plan, and was properly charged up against defendant under the legislation relating to the company.

Held, also, that the liability of defendant would not be affected by a mistake in the resolution in relation to an immater-

ial matter. *McIsaac v. The Municipality of Inverness*, 105.

2. *Municipal Corporation — Railway Aid—Construction of Agreement — Description of Lands—Reference to Plans—R.S.N.S., 1900, ch. 99—3 Edw. VII. ch. 97 (N.S.).*—A municipality passed a resolution by which it agreed to pay for lands required for the right of way, station grounds, sidings and other purposes of a railway as shewn upon a plan filed under the provisions of the general Railway Act. At the time of the resolution there were four such plans filed, each shewing a portion of the land proposed to be taken for these purposes, and including, in the aggregate, a greater area than could be expropriated for right of way and station grounds under the provisions of the Acts applicable to the undertaking of the railway company. The Legislature passed an Act confirming such resolution. To an action by the owner of the land taken, on an award fixing the value of that in excess of what could be so expropriated, the corporation pleaded no liability on account of such excess, and also, that there was no specific plan on file describing the land:—

Held, affirming the judgment appealed from, that the first defence failed because of the Act

confirming the resolution, and, as to the second, that the four plans should be read together and considered to be the plan referred to in such resolution. *County of Inverness v. McIsaac*, 109.

3. *Arbitration and Award—Lands, etc., Taken for Railway Purposes—Authority of Arbitrator to Act—Failure to give Notice before Entry—Trespass—Liability of Company.*]—By the Acts of 1902, ch. 104 (N.S.), the recompense to the owner of land taken for railway purposes, and for the value of earth, stones, gravel, etc., removed, was required to be fixed by three arbitrators, one chosen by the company, another by the owner or proprietor, and, where these were unable to agree as to the amount of their award, a third, to be appointed by the two arbitrators first nominated. The company's engineer wrote to M., who had previously acted for the company, requesting him to ascertain whether plaintiffs had arranged their title to the gravel pit at Loch Ben in such a way that the arbitrators could get to work and, if so, to let them know that he (M.) was prepared to act, "and asked them to appoint their man so that you two, if you cannot agree to the valuation, may select a third." He added, "I will send an agreement of arbitration which each

one can subscribe to, or, if they have one already drafted, you can forward it here for approval." No agreement was sent by the engineer, and none was forwarded for approval by M., but, acting on the letter received, M., in company with plaintiff's nominee, met and investigated the damages, and, with C., who was appointed third arbitrator, signed an award for the amount of which action was brought:—

Held (Russell, J., dissenting on this point), that the letter written by the company's engineer, in the absence of anything in the statute as to how the arbitration was to be conducted, or the steps to be taken previous to inquiry, was as effective as any agreement, even if such were necessary, and the company were bound by it.

Held, also, that defendants, having failed to proceed in the regular way, by giving notice to the proprietors of the purposes for which they entered, and for which they could only enter after notice, were trespassers and liable as such. *McIsaac v. Inverness R.W. & Coal Co.*, 112.

4. *Expropriation of Land—Arbitration—Authority for Submission—Trespass—2 Edw. VII. ch. 104 (N.S.).*]—By statute in Nova Scotia, if land is taken for railway purposes the

compensation therefor, and for earth, gravel, etc., removed, shall be fixed by arbitrators, one chosen by each party and the third, if required, by those two. A railway company intending to expropriate, their engineer wrote to M., who had acted for the company in other cases, instructing him to ascertain whether the owners had arranged their title so that the arbitration could proceed, and, if so, to ask them to nominate their man, who, with M., could appoint a third if they could not agree. The engineer added, "I will send an agreement of arbitration which each one can subscribe to, or, if they have one already drafted, you can forward it here for approval." No such agreement was sent by, or forwarded to, the engineer, but the three arbitrators were appointed and made an award on which the owners of the land brought an action:—

Held, reversing the judgment appealed from, that as the company had not taken the preliminary steps required by the statute which, therefore, did not govern the arbitration proceedings, the award was void for want of a proper submission.

The company entered upon land and cut down trees and removed gravel therefrom without giving the owners the notice required by statute of their in-

tention to take their property. The owners, by their action above mentioned, claimed damages for trespass as well as the amount of the award.

Held, that as the act of the company was not authorized by statute the owners could sue for trespass and as, at the trial, the action on this claim was dismissed on the ground that such action was prohibited, there should be a new trial. *Inverness R.W. and Coal Co. v. Angus McIsaac and Murdoch McIsaac*, 121.

5. *Power Company — Incorporation of Provisions of Railway Act as to Sufficiency of Notice—Immediate Possession—3 Edw. VII. ch. 58 (D.).*—The defendants had, under their Special Act, power to acquire "any privilege or easement required by the company . . . over and along any land, without the necessity of acquiring a title in fee simple thereto"; and the Act defined "land" as including any such privilege or easement, etc. In giving notice of expropriation the defendants did not state whether it was the fee simple, or merely some easement or privilege over the land which they sought to acquire, but only that they proposed to acquire the land "to the extent required for the corporate purposes of the company":—

Held, that such notice was too

uncertain a foundation for expropriation proceedings, and the defendants were not entitled to a warrant for immediate possession under section 170 of the Railway Act of 1903, 3 Edw. VII. ch. 58 (D.). *Lees v. The Toronto and Niagara Power Co.*, 128.

6. *Taking Railway Lands—Powers of Board on Application—Compensation—Railway Act, 1903, sec. 137.*—The Guelph and Goderich Railway Co. applied to the Board under section 137 of the Railway Act, 1903, for authority to take possession of, use and occupy land of the Grand Trunk Railway Co. along the harbour of the town of Goderich. The latter company opposed the application claiming that they were likely to require for their business in the future two additional sets of tracks upon that land. The land in question was upon a hillside and the construction of the two additional tracks would cut away a strip of land required for the proper support of the tracks which the Guelph and Goderich Railway Co. wished to lay upon the land required from the Grand Trunk:—

Held, that the Board is empowered by section 137 of the Railway Act, 1903, to authorize one railway company to occupy and use the lands of another, even to the serious loss and de-

triment of the latter, due compensation being made therefor, but such injury should be avoided, except where the public interest imperatively demands it. *Re Guelph & Goderich R.W. Co. and Grand Trunk R.W. Co.*, 138.

7. *Railway Act, 1903, secs. 152, 153, 171—Right of Action Where Land entered upon by Railway Company before Expropriation Proceedings begun.*—The filing of a plan, profile and book of reference under the Railway Act, 1903, shewing the land required for the railway, does not warrant the company in taking possession of it before proceedings for expropriation are commenced, unless by agreement with the owner; and, if such possession is taken, the company is a trespasser, and the owner is not limited to the remedy by arbitration provided by the Act, but may proceed by an ordinary action at law against the company. *Wicher v. Canadian Pacific R.W. Co.*, 181.

8. *Railway Act—Appeal from Award—Choice of Forum—Curia Designata.*—By section 168 of the Railway Act, 1903, 3 Edw. VII. ch. 58 (R. S. C. (1906) ch. 37, sec. 209), if an award by arbitrators on expropriation of land by a railway company exceeds \$600 any dissatisfied party may

appeal therefrom to a Superior Court which in Ontario means the High Court or the Court of Appeal (Interpretation Act, R. S. C. (1906), ch. 1, sec. 34, sub-sec. 26) :—

Held, that if an appeal from an award is taken to the High Court there can be no further appeal to the Supreme Court of Canada which cannot even give special leave. *James Bay R.W. Co. v. Armstrong*, 196.

9. *Immediate Possession — Necessity for — Station Site — Plans Not Prepared — Section 170 Railway Act, 1903.* — A railway company having obtained an order from the Board authorizing it to take the lands of the owner for the purposes of a station the company made a motion under section 170 of the Railway Act, 1903, for an order for immediate possession of the said lands :—

Held, that as the affidavits failed to shew that the railway company was ready forthwith to proceed with the erection of the station, the motion must be dismissed, but without prejudice to the right of the railway company to renew the motion when the conditions have changed. *Re Williams and Grand Trunk R.W. Co.*, 200.

10. *Orders in Council—Board of Railway Commissioners —*

Railway Act, 1903, sec. 122, sub-secs. 1, 5, secs. 132, 133, sub-sec. 1—Right of Placer Miners — Open Mines — Deposit of Waste — Licenses — Renewal — Plan of Line of Railway— Omission to File—Injunction— Compensation — Jurisdiction of Territorial Court — Remedy — Arbitration.] — The defendants claimed the right to construct their railway under the authority of certain orders in council having obtained the approval of the Board and Minister of the Interior of a route map referred to in sub-section 1 of section 122 of the Railway Act, 1903, but not that referred to in sub-section 5 of section 122 :—

Held, 1. Before the defendants could expropriate land without the consent of the owners they must comply with the provisions of the Railway Act, 1903.

2. Placer miners are owners within the meaning of the Railway Act, 1903, and entitled to compensation.

3. A placer mine is an open mine within section 132 of the Railway Act, 1903.

4. The plaintiffs were entitled to an injunction restraining the defendants from constructing their works and injuriously affecting the working of the plaintiff's placer mining claims held by them under licenses issued under the placer mining regu-

lations, sections 132 and 133, Railway Act, 1903: *Yale Hotel Co. v. Vancouver, Victoria & Eastern R.W. and Navigation Co.*, 3 Can. Ry. Cas. 108, followed. *Day v. Klondike Mines R.W. Co.*, 203:

Possessory Title—Limitation of Action—Right of Possessor to Compensation.]—See TRESPASS, 1, 2.

Trial Line—Negligent Exercise of Statutory Powers—Damages.]—See TRESPASS, 3, 4.

FARM CROSSINGS.

Railway Act, R.S.C. ch. 37, sec. 253—Railway Act, 1903, sub-sec. 2, sec. 198.]—Wright having purchased lands on both sides of the Canada Southern Railway after the line was constructed, for which no farm crossing had been furnished, applied to the Board for a farm crossing over the railway. Without this crossing an inconvenient route was necessary to reach the lands of the owner across the railway:—

Held, by the Chief Commissioner following *Ontario Lands & Oil Co. v. Canada Southern R.W. Co.*, 1 Can. Ry. Cas. 171, that the applicant had no absolute legal right to the crossing; that it could only be granted by

the Board in the exercise of the discretion given by section 253 of the Railway Act (sub-section 2, section 198 Railway Act, 1903); that the applicant should, therefore, bear the cost of its construction and maintenance and the company should receive reasonable compensation, but,

Held, by the majority of the Board that the railway company must construct and maintain at its own expense an adequate and satisfactory farm crossing over the railway on Wright's farm. *Wright v. Michigan Central R. W. Co.*, 133.

Temporary Road—Dedication—Entrance Gates—Agreement to Provide—Right of Way.]—See HIGHWAY, 1.

FENCES.

1. *Responsibility—Lack of Fence by the consent of the Neighbouring Proprietors—Canadian Railway Act, 51 Vict. ch. 29, sec. 194.*]—*Held*, section 194 of the Canadian Railway Act (51 Vict. ch. 29), obliging railway companies to construct fences on both sides of their track, is imperative and a matter of public interest, and the responsibility it imposes extends to a third party whose animal being lawfully on neighbouring ground, is killed owing to the absence of such fence, although it was at

the request of the proprietor whose land bordered on the railway tracks that the company omitted to make said fence. *Quebec Central R.W. Co. v. Pellerin*, 1.

2. *Animals Killed on Track—Defect in Fence—Knowledge—Escape of Animals From Adjoining Land—Railway Act, 1903, sec. 237, sub-sec. 4.*]—Four horses, the property of the plaintiff, escaped through an open gate on to a highway, thence through an opening on to a neighbour's land, and thence through an opening in defendants' fence to the track where they were injured by one of defendants' trains:—

Held, under section 237, sub-section 4, Railway Act, 1903, that the defendants were liable. *Carruthers v. Canadian Pacific R.W. Co.*, 13.

3. *Animals Killed on Track—Defect in Fence—Knowledge—Escape of Animals from Adjoining Land—Railway Act, 1903, secs. 199, 237(4).*]—Four horses, the property of the plaintiff, escaped through an opening on to a highway, thence through an opening on to a neighbour's land and thence through an opening in defendants' fence to the track; where they were injured by one of defendants' trains:—

Held (affirming Richards, J.), that under the Railway Act, 1902, secs. 199 and 237, sub-sec. 4, the defendants were liable.

Phippen, J.A., dissenting. *Carruthers v. Canadian Pacific R.W. Co.*, 15.

4. *Animals Killed on Track—Absence of Fence—Liability—Railway Act, 1903, sec. 199, sub-sec. 3—Lands “not Improved or Settled, and Inclosed.”*]—The railway line of the defendants passes through the land of the plaintiff which is owned, occupied, and cultivated by him. There is no fence whatever on or around plaintiff's land, nor on either side of the railway.

Plaintiff's cow was pasturing on his land south of the railway when she ran on the track and was killed:—

Held, that the lands adjoining the railway must not only be improved or settled, but also enclosed before the company is required to erect fences under section 199 of the Railway Act, 1903. *Schellenberg v. Canadian Pacific R.W. Co.*, 29.

5. *Railway Act, 1903—Stat. of Can. ch. 58—Cattle Straying on Track—Liability of Company for Killing—Negligence—Meaning of “Otherwise” in Section 237, sub-section 4.*]—Cattle being pastured in common by the occupiers of improved lands bor-

dering on the defendant company's railway found their way to the track, and were killed by a passing train of the defendant company. It was proved that the defendants' fence along the common pasture was defective, that the company had notice of the defect and neglected to repair it, but there was no evidence as to how the cattle got on the track:—

Held, that under the Railway Act it might be inferred that the cattle found their way to the track through the defendants' defective fence, and a verdict for the plaintiff should have been sustained.

Sub-section 4 of section 237 of the Act provides that when any cattle or other animals at large upon the highway or "otherwise" get upon the property of the company and are killed or injured by a train, the owner shall be entitled to recover for the loss or injury from the company, unless they shew the negligence or wilful act or omission of the owner:—

Held, that the word "otherwise" means "otherwise at large," and not otherwise at large in a place *ejusdem generis* with a highway. *Daigle v. Temiscouata R.W. Co.*, 33.

6. *Railway Act, 1903—Damage to Trespassing Cattle—Liability of Company—Defective*

Fence—Negligence—Burden of Proof.]—A railway company is liable for damages for killing a cow which was at large on the highway with the knowledge of the owner contrary to the Railway Act, 1903, and which strayed from the highway to the land of D., and from there to the railway track through a defective fence which the defendant company were obliged to maintain.

The company are liable for damage done to the land of an adjoining owner by cattle of a neighbour trespassing by reason of a defective fence which it was the duty of the company to maintain. *Lizotte v. Temiscouata R.W. Co.*, 41.

7. *Animal Killed by Fall from Bridge—Defective Fence—Negligence.*] — The plaintiff was the owner of a farm adjoining the defendants' railway. The tenant of the plaintiff made an opening in the railway fence without the knowledge of the defendants through which a few hours after the plaintiff's horse escaped on to the railway, where it was killed by falling from a bridge:—

Held, that the defendants were not liable for the act of a third party (the tenant) in making an opening in the fence. *Flewelling v. Grand Trunk R.W. Co.*, 47.

FIRES.

1. *Negligence — Fire — Destruction of Property in Neighbourhood — Right of Way — Findings of Jury—View—Misdirection — Non-direction — Damages—Railway Act, 1903, sec. 239.*]—A fire starting on or near the right of way of a railway company caused by one of their locomotives, spread or jumped to the property of the plaintiffs, which was destroyed.

The defendants contended that the rocky bluff where the fire started was not within their right of way, that section 239 of the Railway Act, 1903, applies only to property upon or along the route of the railway and did not apply to that of the plaintiffs, which was three miles distant:—

Held, Martin, J., *dissenting*, that the question of how the fire reached the plaintiffs' property and the position of the rocky bluff were properly left to the jury.

2. That the word "along" in section 239 does not mean only "adjoining to" or "contiguous to," as does the word "along-side," but "in the neighbourhood of" or "near" or "close to" and receives additional force from the expression "upon or along" not simply "along."

The jury found a general verdict for \$18,000. It was urged

that under section 239 the damages could not exceed \$5,000, but,

Held, that the finding that the defendants left inflammable material on the right of way disposed of that objection and the defendants were liable for the full amount as found by the jury. *Blue v. Red Mountain R.W. Co.*, 219.

2. *Negligence — Fire Started by Spark from Locomotive—Evidence of Cause of Fire—Joinder of Plaintiffs Having Separate Causes of Action Arising Out of Same Event—King's Bench Act, Rule 218—Costs.*]—If it appears from the evidence that there was no other possible cause for the starting of a prairie fire near a railway track than sparks from a passing locomotive, the proper conclusion to be drawn is that the railway company is liable, notwithstanding that the sparks must have carried the fire an unusual distance and that no evidence was given as to the condition of the smoke stack and netting at the time.

A number of plaintiffs joined in the Tait case presenting separate claims for losses by the same fire which plainly appeared by the statement of claim, to which the defendants filed a statement of defence without having moved to strike out any of the claims:—

Held, without deciding whether Rule 218 of the King's Bench Act justified the joinder of plaintiffs in this case, that it was too late to take the objection of misjoinder at the trial.

A reduction was ordered to be made from plaintiff's counsel fees for the trial, because considerable time was taken up in proving title to the property destroyed which the defendants had not been asked to admit, and which would be presumed from mere possession as against tort feorsors. *Tait v. Canadian Pacific R.W. Co.*, 417. *Bain v. Canadian Pacific R.W. Co.*, 417. *Kellett v. Canadian Pacific R.W. Co.*, 417.

Prairie Fires Ordinance—Provisions for Safeguarding Right of Way—Intra Vires—Conviction—Review on Certiorari.] — See CONSTITUTIONAL LAW, 3.

FREIGHT.

Controllable Freight—Interpretation of Contract.] — See AGREEMENT.

GATES.

Defect in—Knowledge of Owner.]—See FENCES, 2, 3, 4.

Temporary Road—Dedication—Right of Way—Agreement to Provide.]—See HIGHWAYS, 1.

GOODWILL.

Value—Hotel Property—Compensation for.] — See ARBITRATION, 3.

GRAVEL.

Public Road—Taking Gravel.]—See HIGHWAYS, 2.

HAND CAR.

Signal at Crossing—Warning—Negligence—Jurisdiction of Railway Commission.] — See HIGHWAY CROSSING, 2.

HIGHWAYS.

1. *Public Highway—Dedication—Temporary Road—Deed of Grant—Construction—Farm Crossings—Entrance Gates—Agreement to Provide—Right of Way.*]—The plaintiffs constructed their railway through a quadrilateral parcel of land owned by one Smithson, the predecessor in title of the defendant.

By an agreement with Smithson, the plaintiffs acquired (for a temporary road) a strip of land crossing their tracks leading from the Hamilton road to the Johnson settlement road, which was used as a diversion under section 183 of the Railway Act, 1888, while a bridge was being constructed to carry

the railway over the Hamilton road and afterwards while repairs were being made. In the deed from Smithson the plaintiffs agreed to erect in lieu of farm crossings, four gates for entrances to the temporary road from the four parcels of land into which the original parcel had been sub-divided.

The plaintiffs closed that part of the temporary road leading from their right of way to the Johnson Settlement road and brought an action for an injunction restraining the defendant from trespassing upon it:—

Held, that the temporary road had not been dedicated as a highway, but that the defendant was entitled to a right of way over it to reach the Johnson Settlement road. *Toronto, Hamilton & Buffalo R.W. Co. v. Hanley*, 321.

2. *Crossing and Diverting Highways — Taking Gravel — Term of Years—Railway Act, 1903, sec. 2(s) and (bb), secs. 118(l) and (q), 119, 141, and 186.*]—For the purpose of taking gravel from lands on both sides of a highway, a railway company applied to the Board for authority to construct and operate tracks over such highway for a term of years, to close to public traffic a portion of such highway, and to open a new road in lieu thereof:—

Held, that it is not necessary to comply with section 141 where the company can acquire the lands containing the gravel and has a right of way thereto, that for such purposes the company may exercise the same powers for crossing and diverting highways as for the construction and operation of its main line, and that a diversion of the highway may be authorized for the time necessary to exhaust the gravel pit upon proper terms for safeguarding the interests of the municipality and of the public. *Railway Act, 1903, sec. 2(s) and (bb), secs. 118(l) and (q), 119, 141 and 186 referred to. Canadian Pacific Ry. Co. v. Township of North Dumfries*, 147.

3. *Highways Across Railway — Right of Private Individuals and Public Bodies to Make— Powers of Board as to Specific Performance — Sections 23, 36, 47, 184 to 191, Railway Act, 1903.*] — Upon applications by certain towns and villages in Alberta in respect of street crossings over the Canadian Pacific Railway:—

Held, that while the Board has no general jurisdiction to determine whether a public right of crossing over a railway exists, yet in cases where it is called upon to exercise the

powers specifically conferred upon it, or its jurisdiction to enforce the performance of the duties of railway companies with respect to highways, it has incidentally to inquire and determine whether in fact a right of crossing does or does not exist at any particular point, sections 186 and 187 Railway Act, 1903.

Section 187 enables the Board to give leave for the construction of a highway across a railway, but does not provide means by which private individuals or bodies not otherwise possessed of power to open highways, can do so.

The Board is not authorized to direct or compel railway companies to construct or make highways across their lands, where a public right of crossing does not already exist by law, although it may give leave to a company or some other body to do so.

The question as to the power of a railway company to dedicate a portion of its right of way for use as a public highway without the authority of the Railway Committee or the Board under the Railway Acts reserved for further argument. *High River v. Canadian Pacific R.W. Co.*, 344.

Street Railway — Operation Along Highway — Leave of Municipality.] — See HIGHWAY CROSSINGS, 1.

HIGHWAY CROSSINGS.

1. *Branch Line — Operation Along Highway — Street Railway — Leave of Municipality — Railway Act, 1903, sec. 184.*] — The Niagara, St. Catharines and Toronto Railway Co. applied to the Board for leave to cross certain streets in the town of Thorold by a branch line already authorized by the Board.

The municipality contended that the applicants' railway is a street railway or tramway, or operated as such, and that, under the Railway Act, 1903, sec. 184, the leave of the municipality must be obtained by by-law before a street railway or tramway can cross its streets:—

Held, upon the evidence, that the proposed branch line is not a street railway or tramway, and that section 184 only applies to operation along highways and not to crossings thereof. *In re Niagara, St. Catharines and Toronto R.W. Co., Thorold Street Crossings*, 145.

2. *Crossing in Town — Hand-car — Warning — Finding of Jury — Railway Commission — Jurisdiction — Infant Plaintiff — Negligence — Contributory Negligence — By-law Against Coasting.*] — A child of ten years of age was coasting down an incline on a street in a town crossed by a railway, and was run down and injured by

a hand-car proceeding along the railway.

At the trial, the jury found in answer to questions, that the defendants were negligent in not giving some warning in approaching the crossing; that the defendants could have avoided injuring the plaintiff by stopping the hand-car, and that it was their duty, apart from the provisions of the Railway Act, to have given warning:—

Held, that the jury, in finding that warning should have been given, were not assuming to lay down any general rule as to what care or precaution should be taken, but simply that under the circumstances some warning should have been given, and that the answer was unobjectionable and in no way infringed upon the jurisdiction of the Railway Commission.

Held, also, that even if a hand-car is not a train, a warning is necessary apart from the Railway Act.

Held, also, that although there was a municipal by-law prohibiting coasting, the plaintiff had not been notified as required by the by-law, and the onus was on the defendants to prove criminal capacity at common law and under the Code of an infant under fourteen, and the defendants were not entitled to invoke such by-law for another purpose.

Held, lastly, that although a defendant is not liable if the injury is caused entirely by an infant's own negligence, the capacity of the infant to be guilty of contributory negligence is a question for the jury, and that as the plaintiff was not a trespasser and was where he had a right to be, and had not been notified under the provisions of the by-law, or his capacity for crime shewn, the whole case was properly submitted to the jury. *Burtch v. Canadian Pacific R.W. Co.*, 461.

Power Company — Right to Cross—Terms — Indemnity.—*See POWER WIRE CROSSING.*

Right to Make, Over Railway —Jurisdiction of Board—Specific Performance.—*See HIGHWAYS*, 3.

Signals — Person Killed 20 Feet From Crossing — Failure to Whistle.—*See NEGLIGENCE*, 3.

Street Railway — Sounding Gong Approaching Crossing—Rule of Company.—*See NEGLIGENCE*, 7.

Warnings — “Look and Listen” — Contributory Negligence.—*See NEGLIGENCE*, 2.

IMMEDIATE POSSESSION.

Notice of Expropriation—Insufficiency — Easement — Spe-

cial Act — Dominion Railway Act.]—See EXPROPRIATION, 5.

Station Site—Necessity for—Plans of Building not Prepared.]—See EXPROPRIATION, 9.

INDEMNITY.

Wire Crossing Railway Lands —Risk of Injury—Conditions.]—See POWER WIRE CROSSING.

INFANT.

Negligence — Contributory Negligence—Coasting on Streets Contrary to By-law.] — See HIGHWAY CROSSINGS, 2.

INJUNCTION.

Illegal Entry on Mines—Placer Mines—Open Mines—Rights of Licensees—Failure to File Plans.]—See EXPROPRIATION, 10.

INTERCHANGE OF TRAFFIC.

Tolls — Branch Line — Continuous Line, Secs. 44, 137, 214, 253, 266, 267, 271, Railway Act, 1903, Amendment 6 Edw. VII. ch. 42, secs. 15, 28—Appeal to Supreme Court.]—The Grand Trunk Ry. Co. constructed a branch line connecting its line of railway with that of the Cana-

dian Pacific Ry. Co.; both companies having terminal facilities in the City of London and no other connection at or near London, except this branch. The Grand Trunk Ry. Co. refused to interchange traffic by means of such branch line, claiming that in the division of rates for traffic interchanged by this branch by the two companies, a larger portion should be assigned to them than would be a fair remuneration for the service to be rendered in transporting cars over this branch and its London terminal lines and loading and unloading them.

Held, that the Grand Trunk Ry. Co. was obliged to furnish for the carriage over its proportion of the continuous line (formed by this branch with the line of the Canadian Pacific Ry. Co.), and for the receipt and delivery of such traffic and for the loading and unloading of cars for the purpose, the same facilities as in respect of traffic passing over its own lines only or transferred to or by it at distant points of the Canadian Pacific Ry. system, and that the apportionment of rates should be deemed to be made on this basis that the division between the railway companies of the joint rates for traffic thus interchanged should be made upon the principle of giving reasonable compensation for the services and facilities furnished by

the respective companies in respect of the particular traffic thus interchanged and not by reference to the magnitude of the business of one company or the other at particular points or the respective advantages which each can offer to the other there, or a comparison of the loss which the one is likely to sustain with the gain likely to accrue to the other from the giving of the facilities which the law requires.

Upon appeal to the Supreme Court of Canada—

Held, 1. That the Board had authority under the Railway Act, 1903, and particularly under sections 253, 271, 266 and 267, to make the order in question under the circumstances in this case.

2. That sections 266 and 267 of the Railway Act, 1903, are applicable under the circumstances of this case where one and the same through rate is charged to and from all points within the district lying in and about the City of London to which the order applies.

3. That the order appealed from does not involve the obtaining by the Canadian Pacific Ry. Co. of the use of the tracks, station or station grounds of the Grand Trunk Ry. Co. at London for which the Grand Trunk Ry. Co. should obtain

compensation under the Railway Act, 1903, and particularly under section 137.

4. That the Board was not "bound as a matter of law" to take into consideration, in estimating the remuneration or compensation to be allowed to the Grand Trunk Ry. Co. in consequence of or for what was required of that company by the said order:—

(a) The magnitude of the business of the Grand Trunk Ry. Co. at London as compared with that of the Canadian Pacific Ry. Co. at that point;

(b) The comparative advantages which each of the said two companies can offer to the other there;

(c) A comparison of the loss which one company is likely to sustain with the gain likely to accrue to the other company from the giving of these facilities which the law requires;

(d) The amount which may have been expended by the Grand Trunk Ry. Co. in the acquisition of its terminal facilities at London or the value of its investments therein, otherwise than as evidence of the fair value of the service to be rendered and of the use of the facilities to be afforded under the said order: *Grand Trunk R.W. Co. v. Canadian Pacific R.W. Co. and London*, 327.

INTEREST.

Compensation — Expropriation—Award.] — See ARBITRATION, 3.

INTERLOCKING APPLIANCES.

Board — Power to Order — Cost of Agreement—Interpretation.]—See RAILWAY CROSSINGS.

JURISDICTION.

Railway Commission — Provincial Railway.]—See BRANCH LINE.

JURY.

Negligence—Findings— View — Misdirection or Non-direction — New Trial.]—See FIRES, 1.

Negligence — Contributory Negligence—New Trial.] — See NEGLIGENCE, 2, 3, 4, 5.

Master and Servant—Defect in Machinery — Damages at Common Law — Workmen's Compensation Act.]—See NEGLIGENCE, 6.

“Ultimate” Negligence— Rule of Company—Street Railway—Withdrawal from Jury— Misdirection.] — See NEGLIGENCE, 7, 8.

LICENSE.

Hotel — Expropriation —

Compensation for — Goodwill.] — See ARBITRATION, 3.

Placer Mines—Open Mines— Right to Compensation.]—See EXPROPRIATION, 10.

LIMITATION OF ACTION.

Continuing Trespass—Possessory Title.]—See TRESPASS, 1, 2.

MALICIOUS ARREST.

Watchman—Scope of Authority — Railway Act, 1903, sec. 241.]—See RAILWAY CONSTABLE.

MANDAMUS.

Third Class Fares—Accommodation—Grand Trunk Railway Act — Jurisdiction of Board.]—See PASSENGERS, 1.

MASTER AND SERVANT.

Defect in Machinery—Defective System of Inspection — Workmen's Compensation Act.] — See NEGLIGENCE, 6.

Offence of Company—Conviction of Officer — Third Class Fares.]—See CRIMINAL LAW.

Watchman—Scope of Authority — Malicious Arrest.] — See RAILWAY CONSTABLE.

MECHANICS' LIEN.

Railways — Railway Act, 1903, sec. 240.]—See CONSTITUTIONAL LAW, 1, 2.

Railways — Provincial Laws Affecting—Railway Act, 1903, sec. 240.]—See CONSTITUTIONAL LAW, 1, 2.

MINES.

Placer Mines—Open Mines—Rights of Licensees as Owners—Injunction — Compensation.]—See EXPROPRIATION, 10.

MINING CLAIM.

Arbitration — Award—Value—Evidence—Misconduct of Arbitrator.]—See ARBITRATION, 1, 2.

MISTAKE.

Filing Plans — Immaterial Mistake.]—See EXPROPRIATION, 1, 2.

MOTION.

Setting Aside Award — Misconduct of Arbitrators — Evidence—Interest — Payment out of Court.]—See ARBITRATION, 1, 2.

MUNICIPAL FRANCHISE.

Street Railways — Toronto

Railway—Streets in Newly Annexed Territory—Extension of Road Into—Stopping Places—Right to Fix—Determination of Engineer.]—Section 14 of the agreement entered into between the plaintiffs and defendants, set out in 55 Vict. ch. 99 (O.), whereby the defendants are required to establish and lay down new lines and to extend the tracks and street car service on such streets as may be, from time to time, recommended by the city engineer and approved by the city council, does not apply to territory which was not within the limits of the city at the date of the agreement; but has subsequently been annexed to and become part thereof.

Toronto R.W. Co. v. City of Toronto, 37 S.C.R. 430 (reversing the judgment of the Court of Appeal, 10 O.L.R. 657), followed.

By section 26 of the agreement the "speed and service" necessary on each main line, part of same, or branch, is to be determined by the city engineer and approved by the city council; and by section 39 the cars shall only be stopped clear of cross streets and midway between streets, where the distance exceeds six hundred feet:—

Held, subject to the limitations of clause 39, that the regulating of the places at which cars shall be stopped came with-

in condition 26 relating to the speed and service, and was therefore to be determined by the city engineer and approved of by the council.

The engineer made a report to the council recommending that cars should be required to stop at certain specified points, which was adopted by resolution of the council:—

Held, that the engineer did not occupy a judicial or quasi-judicial position between the parties to the agreement, and was not bound to consult with the defendants before determining what service should be supplied, and that such report, though somewhat informally expressed, was a sufficient determination on the part of the engineer, and that the adoption by resolution was sufficient, it not being essential that such adoption should be by by-law.

Held, also, that the plaintiffs were entitled to an order restraining the defendants from running the cars upon their railway, except in accordance with the determination of the engineer as to the stopping places. *Corporation of the City of Toronto v. Toronto R.W. Co.*, 381.

Provincial Railway — Crossing Dominion Line — Approval of Board.] — See RAILWAY CROSSING, 2.

MUNICIPALITY.

By-law Against Coasting on Streets — Injury to Infant at Crossing — Negligence — Contributory Negligence.] — See HIGHWAY CROSSING, 2.

Lands Taken for Railway Purposes — Plan — Filing — Mistake as to Immaterial Matter.]—See EXPROPRIATION, 1, 2.

Lands Taken for Railway Purposes — Plan—Immaterial Mistake.]—See EXPROPRIATION, 1.

Street Railway — Leave to Operate Along Highway — Crossing.] — See HIGHWAY CROSSING, 1.

Street Railway — Extensions — Newly Acquired Streets — Stopping Places—Powers of Engineer.]—See MUNICIPAL FRANCHISE.

NEGLIGENCE.

1. *Defective Construction of Road-bed — Dangerous Way — Vis Major—Evidence—Onus of Proof — Latent Defect.*]—The road-bed of applicants' railway was constructed, in 1893, at a place where it followed a curve round the side of a hill, a cutting being made into the slope and an embankment formed to carry the rails, the grade being one and one-half per cent. or

78.2 feet to the mile. The whole of the embankment was built on the natural surface, which consisted as afterwards discovered, of a layer of sandy loam of three or four feet in depth resting upon clay sub-soil. No borings or other examinations were made in order to ascertain the nature of the subsoil and the road-bed remained for a number of years without shewing any subsidence except such as was considered to be due to natural causes and required only occasional repairs; the necessity for such repairs had become more frequent, however, for a couple of months immediately prior to the accident which occasioned the injury complained of. Water, coming either from the ditch, or from a natural spring formed beneath the sandy loam, had gradually run down the slope, lubricated the surface of the clay and, finally, caused the entire embankment and sandy layer to slide away about the time a train was approaching, on the evening of 20th September, 1904. The train was derailed and wrecked and the engine-driver was killed. In an action by his widow for the recovery of damages:—

Held, that in constructing the road-bed, without sufficient examination, upon treacherous soil and failing to maintain it in a safe and proper condition, the railway company was, *prima*

facie, guilty of negligence which cast upon them the onus of shewing that the accident was due to some undiscoverable cause; that this onus was not discharged by the evidence adduced from which inferences merely could be drawn and which failed to negative the possibility of the accident having been occasioned by other causes which might have been foreseen and guarded against, and that, consequently, the company was liable in damages.

Judgment appealed from affirmed, following *Great Western R.W. Co. v. Braid*, 1 Moo. P.C. (N.S.) 101. *Quebec and Lake St. John R.W. Co. v. Julien*, 54.

2. *Findings of Jury* — “*Look and Listen.*”]—M. attempted to drive over a railway track which crossed the highway at an acute angle where his back was almost turned to a train coming from one direction. On approaching the track he looked both ways, but did not look again just before crossing when he could have seen an engine approaching which struck his team and he was killed. In an action by his widow and children the jury found that the statutory warnings had not been given and a verdict was given for the plaintiffs and affirmed by the Court of Appeal:—

Held, affirming the judgment

of the Court of Appeal, Fitzpatrick, C.J., *hesitante*, that the findings of the jury were not such as could not have been reached by reasonable men and the verdict was justified. *Wabash R.W. Co. v. Misener*, 70.

3. *Contributory Negligence—Death of Person run over on Railway Track through Negligence of Crew of Engine—Railway Act, 1903 (D.), sec. 224.*—The plaintiff's husband, while in the actual discharge of his duty as section foreman on the defendants' railway examining the track, was struck by a yard engine running backwards. No lookout was on the tail board or rear of the engine and no signal of any kind was given to warn the deceased of the approach of the engine.

Held, that there was ample evidence to support the findings of the jury that the deceased came to his death in consequence of the negligence of the engine crew in neither blowing the whistle, ringing the bell nor keeping a proper lookout, and that the deceased could not, by the exercise of reasonable care under the circumstances, have avoided the accident, and that the appeal from the verdict in favour of the plaintiff should be dismissed.

Although the deceased, if he had looked round, would have seen the approaching engine and

stepped out of the way, yet he was engaged at the time in the discharge of a duty of an absorbing character which would naturally take his whole attention and, under the circumstances, a jury might properly infer that there was no absence of reasonable care on the part of the deceased. Moreover, even if the deceased had been guilty of negligence, the defendants would still be liable if the engine crew could, by the exercise of reasonable care, have avoided the accident.

Coyle v. Great Northern R.W. Co. (1887), L.R. 20 Ir. 409; *The Bernina* (1887), 12 P.D. 58; *Kelly v. Union R.W. & T. Co.* (1888), 8 S.W.R. 20; *Canada Southern R.W. Co. v. Jackson* (1890), 17 S.C.R. 316; *London and Western Trusts Co. v. Lake Erie and Detroit River R. W. Co.* (1906), 12 O.L.R. 28, 7 O.W.R. 751, 5 Can. Ry. Cas. 364, followed.

The omission of a common law duty is actionable negligence equally with the omission of a statutory duty, and the common law requires the defendants' servants, when running through the yard, to take the obvious precaution of watching for workmen lawfully on the track and giving them timely warning: *Canada Atlantic R.W. Co. v. Henderson* (1899), 29 S.C.R. 632.

Held, also, that the jury would have been justified if they had drawn inferences unfavourable to the defence from the fact that neither the engineer nor the fireman who were in charge of the engine was called to give evidence for the defence: *Green v. Toronto R.W. Co.* (1895), 26 O.R. 319.

The accident occurred within twenty feet of a public highway crossing, but,

Quære, whether section 224 of the Railway Act, 1903 (D.), requiring that the whistle should be sounded when approaching a highway crossing and that the bell should be continuously rung until the highway is crossed, can be invoked on behalf of any persons except those using the highway crossing. *Wallman v. Canadian Pacific R.W. Co.*, 229.

4. *Injury to Person at Highway Crossing — Findings of Jury—Train "Behind Time"—Dominion Railway Act, 1903, sec. 215.*]—In an action to recover damages for the death of a man who was struck by a train of the defendants at a highway crossing, the evidence as to whether the statutory signals were given was conflicting, and, while it was shewn that the train was about ten minutes late, there was no evidence as to the cause of the delay, nor was it shewn that the deceased was

misled thereby. The jury found that the defendants were guilty of negligence, which consisted in the train being "behind time;" but they did not answer a question put to them as to whether the bell was ringing:—

Held, that no actionable negligence was shewn or found, and the action should be dismissed; it was not a case for a new trial.

Section 215 of the Dominion Railway Act, 1903, which requires that all regular trains shall be started as nearly as practicable at regular hours, fixed by public notice, did not aid the plaintiffs.

Judgment of Boyd, C., reversed. *Hanly v. Michigan Central R.W. Co.*, 240.

5. *Street Railway — Piling Snow at Side of Track—Contributory Negligence—Plaintiff Putting Himself in Peril.*]—An appeal by defendants from the judgment of the Divisional Court, reported 11 O.L.R. 56, 5 Can. Ry. Cas. 30, was dismissed: Meredith, J.A., dissenting. *Preston v. Toronto R.W. Co.*, 249.

6. *Master and Servant—Defect in Machinery—Defective System of Inspection—Workmen's Compensation for Injuries Act—R.S.O. 1897, ch. 160, sec. 3, sub-sec. 1, sec. 6, sub-sec. 1.*]—On the trial of this action—which was against a railway company to recover dam-

ages for the death of the deceased through scalding by the escape of steam occasioned by the giving away of a water tube in a locomotive engine on which he was working—the jury, in answer to questions submitted to them, which, with the answers to them, are set out in the report, found that the death was caused by a defect in the condition of the locomotive, “through the defendants not supplying proper inspection,” the defect itself not being specified, but from a discussion which the trial Judge had with the jury when they brought in their answers, and from the answers to further questions submitted to them, such defect it appeared consisted in the fact that the end of the tube in question had not been sufficiently “belled” by one J., who had put the tube in the boiler:—

Held, that there was no evidence to support liability at common law, but that the evidence and findings of the jury sufficiently established what the defect was, and that J. was a person entrusted with the work, so that there was liability under the Workmen’s Compensation Act, in respect of which the deceased’s widow and administratrix could maintain the action, and was entitled to recover the damages assessed by the jury under the above Act.

Meredith, J.A., dissenting on the question of liability under the Act. *Schwob v. Michigan Central R.W. Co.*, 287.

7. *Contributory Negligence—“Ultimate” Negligence—Street Railway — Injury to Person Crossing Track — Neglect of Motorman to Shut off Power on Approaching Crossing—Rule of Company — Withdrawal From Jury — Misdirection.*]—Negligence of a defendant incapacitating him from taking due care to avoid the consequences of the plaintiff’s negligence, may, in some cases, though anterior in point of time to the plaintiff’s negligence, constitute “ultimate” negligence, rendering the defendant liable notwithstanding a finding of contributory negligence of the plaintiff. Such anterior default of the defendant is “ultimate” negligence when it renders inefficient to avert injury to the plaintiff means employed by the defendant after danger became apparent, and which would otherwise have proved adequate to prevent the mischief, or renders the defendant wholly incapable of employing such means, though time was afforded for his using them efficaciously but for such disabling negligence.

Scott v. Dublin and Wicklow R.W. Co. (1861), 11 Ir. C.L.R. 377, approved.

Radley v. London and North

Western R.W. Co. (1876), 1 App. Cas. 754, applied.

The plaintiff in crossing a city street in front of an approaching motor-car of the defendants was admittedly guilty of negligence or contributory negligence, but, on the evidence, would have crossed safely if a moment more had been allowed her. As it was, she was struck by the corner of the car fender and injured. There was evidence of a rule of the defendants that motormen were to shut off power at a certain distance before reaching a crossing, and that the motorman on this occasion did not do so, and in an action for the defendants' negligence causing the plaintiff's injuries the trial Judge in his charge to the jury withdrew the evidence of this rule from their consideration:—

Held, that the place where the plaintiff attempted to cross was a crossing, being opposite a street running at right angles to the street upon which the car was being operated, though not an intersecting street; and the withdrawal of the evidence as to the rule was misdirection, and misdirection which might have affected the result; the jury might, upon the evidence, have found that, but for the motorman's failure sooner to shut off power, or to reduce speed, the momentum of the car

would have been so lessened that he could, with the emergency appliance at his command, have avoided running down the plaintiff; and this failure, though anterior to the plaintiff's negligence, would be "ultimate" negligence, within the meaning of the rule which makes a defendant liable, notwithstanding contributory negligence of the plaintiff, if in the result he (the defendant) could by the exercise of ordinary care have avoided the mischief. *Brenner v. Toronto R.W. Co.*, 261.

8. *Work Train—Rule as to Protecting by Flagmen—Other Precautions—Absence of Continuous Air Brakes*—3 *Edw. VII. ch. 58, sec. 211(D.)—Absence of Liability at Common Law—Liability under Workmen's Compensation Act.*]—The deceased, who was in charge of a gang of labourers, employed in removing earth from a cutting on the defendants' railway, acting, as he believed, in the company's interests, to prevent the loss to them of the labourer's time, by the work train engaged in the work being kept at a siding induced the conductor in charge of the train to move it on to the main track, and to proceed to the cutting, by backing the train slowly. By one of the company's rules, the train should not have been moved,—unless other sufficient precau-

tions were taken,—until flagmen were placed at stated intervals in front and rear of the train. Flagmen were not placed; but the conductor took the precaution of standing himself, as a lookout, on the top of the van, and for a like purpose placed the deceased in the cupola, while it was the duty of the engine driver to keep a strict lookout towards the conductor, so as to observe his signals and to act upon them. When the train was distant some 600 yards from another work train approaching them, also moving slowly, the conductor signalled the engine driver to stop, and had he done so, a collision which occurred, whereby the deceased was killed, would have been avoided:—

Held, that the company were liable, under the Workmen's Compensation for Injuries Act, for the deceased's death through the neglect of the engine driver.

Deyo v. Kingston and Pembroke R.W. Co. (1904), 8 O.L.R. 588, distinguished.

Liability was claimed at common law by reason of the train not being furnished throughout with air brakes, as required by the Railway Act, 3 Edw. VII. ch. 58, sec. 211 (D.):—

Held, that no such liability existed, for the train was not a passenger train, and the accident did not occur through the want of brakes, but by reason of

the engine driver's failure to see and act on the conductor's signal. *Muma v. Canadian Pacific R.W. Co.*, 444.

9. *Street Railways — Injury to Passenger Alighting from Car — Contributory Negligence — Crossing behind Car—Collision with Car on Parallel Track—Duty to Sound Gong—Regulations — "Crossing"—Case for Jury — Costs — Discretion — Appeal.*]—The plaintiff was a passenger on a car of the defendants, and stepped from it while it was in motion, as it reached a street crossing; the motorman had been signalled to stop, but failed to do so. The plaintiff alighted safely, but found himself in front of a horse and cab driven swiftly towards him. In order to avoid a collision with the horse, and also in order to cross to the west side of the street, the plaintiff turned behind the car he had just left and passed on towards the other track; as he reached it, he became aware of a car coming towards him at a rapid rate, and to avoid being run down he flung himself on the fender, thus saving his life, but he was seriously injured. In an action to recover damages for his injuries he was a witness at the trial, and said that it was impossible to get out of the way of the car; he did not hear the gong sound, although if it had

been rung he would have heard it. By one of the regulations forming part of the agreement between the city corporation and the defendants, validated by 57 Vict. ch. 76 (O.), under which the defendants operated their cars on the city's highways, it was provided that each car was to be supplied with a gong, to be sounded by the driver when the car approached to within 50 feet of each crossing. This was not brought to the attention of the Judge at the trial. The plaintiff, however, was aware that it was the usual practice to sound the gong at crossings, and he expected it to be done when a car was approaching a crossing:—

Held, that, even if the regulation had not the force of a statutory requirement, the proof of failure to comply with a precaution which the defendants had recognized as important for the safety of persons using the crossing on streets occupied by the railway, was evidence for the jury of negligence in the conduct of the car; and the question whether the gong was sounded was for the jury.

Semble, per Moss, C.J.O., that the term "crossing" in the agreement, is intended to indicate any place on or along the streets occupied by the railway where there is a walk laid for the purpose of enabling foot passengers

to cross from one side of the street to another, and where the cars would stop to take up or let down passengers; and is not confined to the crossing of an intersecting street.

The Court declined to interfere with the discretion of the Court below in withholding costs from the plaintiff, in setting aside a nonsuit and granting a new trial.

Order of a Divisional Court affirmed. *Wallingford v. Ottawa Electric R.W. Co.*, 454.

Fires—Prairie Fires Ordinance—Conviction—Conflict of Laws.] — See CONSTITUTIONAL LAW, 3.

Hand Car—Warning at Highway Crossing—Infant—Contributory Negligence—By-law Against Coasting on Streets.]—See HIGHWAY CROSSING, 2.

Defective Fences—Knowledge of Owner.]—See FENCES, 5, 6, 7.

Right of Way—Inflammable Material—Destruction of Neighbouring Property.]—See FIRES,

Spark from Locomotive—Cause of Fire—Evidence.]—See FIRES, 2.

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Bill of Lading—Validity of Condition—Approval of

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Easement — Notice Indefinite—Immediate Possession — Railway Act, 1903, sec. 170.]—See **EXPROPRIATION**, 5.

ORDERS-IN-COUNCIL.

Railway Commission—Effect of Order — Placer Miner's Rights—Open Mines — Deposit of Waste—Licenses—Renewal—Approval of Plans.]—See **EXPROPRIATION**, 10.

PARTIES.

Separate Causes of Action—Same Event—Misjoinder—Evidence of Cause of Fire.]—See **FIRES**, 2.

PASSENGERS.

Mandamus—Carriage of Passengers—Rates and Accommodation—Statute Incorporating Grand Trunk Ry. Co.—Juris-

diction of Board of Railway Commissioners.] — Two questions must be found in favour of the applicant before the writ of prerogative mandamus can issue: first, has the applicant a specific legal right to the performance of some duty by the respondent; and, second, will the applicant without the benefit of the writ be left without effectual remedy?

Where the applicant sought a mandamus to compel the Grand Trunk Railway Company, pursuant to section 3 of their Act of incorporation, 16 Vict. ch. 27 (C.), to run a train containing third-class carriages, and to permit the applicant to travel therein on payment of a fare not exceeding one penny a mile:

Held, that the applicant had an adequate remedy under the provisions of the Dominion Railway Act, 1903 (secs. 8, 23, 25, 44, 214 and 294, being specially referred to), and that that remedy could be more conveniently applied and executed under the direction and supervision of the Board of Railway Commissioners than by the Court; and the application was refused. *Re Robertson and Grand Trunk R.W. Co.*, 490.

Carrier of Passengers—Third Class Passengers — Two cent (penny) fare — Powers of Board — Act of Incorporation,

16 Vict. ch. 37(C.) — *Railway Act*, 1903, secs. 3, 4, 5, 6, 212, (sub-sec. 2), 214, 251, 256, 257, 263, 264, 265—6 *Edw. VII. ch. 42*, secs. 18, 23—*Railway Act*, ch. 37, R.S.C., 1906, secs. 26, 30, 55, 269(c), 284, 314, 330, 331.] —*Held*, that section 3 of the Act of incorporation of the Grand Trunk Ry. Co., 16 Vict. ch. 37 (C.), enacting that the fare or charge for each third class passenger by any train on the said railway, shall not exceed one penny currency per each mile travelled, and that at least one train having in it third class carriages, shall run every day throughout the length of the line, has not been repealed either expressly or by implication by subsequent general railway legislation, and is still in force. Upon an application under section 26 of the Railway Act, ch. 37, R.S.C., 1906, the Board made an order requiring the company to run every day throughout the length of its line between Montreal and Toronto at least one train having in it third class carriages, and forbidding it to charge third class passengers fares at more than two cents per mile, and directing it to amend its special tariffs accordingly. *Robertson v. Grand Trunk R.W. Co.*, 494.

Lighting from Street Car—
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Third Class Fares—Officer of Railway—Conviction for Offence of Company.] — See CRIMINAL LAW.

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Approval by Minister—Approval by Board—Omission to File—Injunction.]—See EXPROPRIATION, 10.

POWER WIRE CROSSINGS.

Power Company—Wire Crossings—Railway Lands—

Public Highways — Terms and Conditions — Indemnity—Sections 25, 47 and 194 Railway Act, 1903.]—A power company applied under section 194 of the Railway Act, 1903, to place wires for the transmission of electric power of high voltage across the lands of a railway company.

Held, that the power company should indemnify the railway company from all loss or injury arising from the placing of such wires across its right of way or the transmission of electric power thereon, except where the loss was directly attributable to the negligence of the railway company, its agents or employees.

Upon it subsequently appearing, however, that the transmission lines were constructed along highways under provincial authority in respect of which highways the railway company had merely the right of crossing.

Held, that the power company stands in the position of a telephone company, as in *National Telephone Company v. Baker* (1893), 2 Ch. 186 and the tramway company referred to in *Eastern and South African Telegraph Co. v. Capetown Tramway Companies* (1902), A.C. 381.

Held, also, that the power company should be required to

be responsible only for injuries arising from the negligence of itself or its servants or agents, and in respect thereof the railway company needs no protection by an order of the Board. *Canadian Pacific and Canadian Northern R.W. Cos. v. Kaministiquia Power Co.*, 160.

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RAILWAY CONSTABLE.

Master and Servant—Watchman — Scope of Authority — Malicious Arrest — Dominion Railway Act, 1903, sec. 241.]— A watchman of the defendant company, who was also a constable appointed on their application under section 241 of the Dominion Railway Act, 1903, 3 Edw. VII. ch. 58 (D.), arrested the plaintiffs at a spot about half a mile from the railway line

and swore out an information against them for breaking into a freight car with intent to steal. The evidence failed, and they were discharged, and brought this action for false arrest and malicious prosecution:—

Held, that the defendant company was not liable because the watchman in his capacity as such had no authority, express or implied, either to arrest or prosecute the plaintiffs under the circumstances; and as constable, he was to be regarded as an officer of the law, and not as a servant of the company, and there was no evidence that the defendant company exercised any control over his action as constable. *Thomas v. Canadian Pacific R.W. Co.*, 372. *Bush v. Canadian Pacific R.W. Co.*, 372.

RAILWAY CROSSINGS.

1. *Interlocking Appliances — Order of the Board.]—* Under an agreement dated May 22nd, 1887, it was agreed between the Grand Trunk Ry. Co. and the International Ry. Co. (whose successor is the Canadian Pacific Ry. Co.) that the said International Ry. Co. should bear the cost of providing, maintaining, equipping and working an ordinary level railway crossing together with all risk arising from such constructions and operations.

The agreement also contained the following provision: "In the event of the Government of this Dominion passing any Act whereby certain signals, interlocking switches or other appliances shall be used on level railway crossings, it is hereby understood and agreed that the party of the second part" (being the International Company) "will provide, work and maintain such at their own expenses":—

Held, that the said clause of the agreement should not be narrowly construed, that the Board had authority under the Railway Act, 1903, to order an interlocking system at this crossing for the protection of the public.

Ordered, that the Canadian Pacific Ry. Co. do install, maintain and operate the ordinary interlocking, derailing and signal system at its own expense at the said crossing. *In re Canadian Pacific R.W. Co. and Grand Trunk R.W. Co., Lennoxville Crossing Case*, 77.

2. *Authority of the Board—Provincial Railway—Municipal Franchises—Railway Act, 1903, secs. 137, 177 and 187.*—The Preston and Berlin Street Railway Co., operating a provincial railway under municipal franchises, applied to the Board, under section 177 of the Railway

Act, 1903, for authority to construct two crossings over the Grand Trunk Railway Co.'s tracks, or in the alternative for an order directing the Grand Trunk to shift its tracks so as to afford the applicants access to their freight terminals in the Town of Waterloo. It was suggested on behalf of the town of Waterloo that an order might be made for this purpose under section 187.

Held, 1. That the application for the crossings must be refused as not proper in the public interest.

2. And that the Board, under the Railway Act, 1903, has no authority to compel the Grand Trunk, a Dominion railway, to shift its tracks for the convenience of the applicants, a Provincial railway.

3. And that the Board, under section 137 of the Railway Act, 1903, had not jurisdiction to grant to a Provincial railway company power to take, use or occupy the lands of a Dominion railway company. *Preston and Berlin Street R.W. Co. v. Grand Trunk R.W. Co.*, 142.

3. *Level Crossing — Subway — Provincial Railway — Work for the General Advantage of Canada — Approval of Route and Location Plans — Ontario Electric Railway Act, R.S.O. (1897), ch. 209, sec. 27—Rail-*

way Act, 1903.]—The Windsor, Essex and Lake Shore Rapid Ry. Co. applied to the Board to rescind or vary its order for a subway under the tracks of the Michigan Central Ry. Co. at Essex, and substitute a level crossing.

Upon the evidence the Board reluctantly accepted the recommendation of the chief engineer in favour of a level crossing. The applicants were originally incorporated under the provisions of the Ontario Electric Railway Act, R.S.O. 1897, ch. 209. After obtaining an order for a crossing, their railway and works were declared by 6 Edw. VII. ch. 184 (Dom.), to be works for the general advantage of Canada.

Held, that the route and location plans need not be approved by the Board under the Railway Act, 1903, before the variation of the former order for a crossing could be made. *Windsor, Essex and Lake Shore Rapid R.W. Co. v. Michigan Central R.W. Co.*, 152.

Power Company — Right to Cross—Terms of Crossing—Indemnity.] — See POWER WIRE CROSSINGS.

Taking Lands—Compensation—Jurisdiction of Board—Railway Act, 1903, sec. 137.]—See EXPROPRIATION, 6.

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Bill of Lading — Notice of Claim — Negligence — Railway Act, 1903, secs. 214, 275.]—See CONDITION LIMITING LIABILITY.

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Traffic Accommodation—Jurisdiction of Board — Replacing Connections.] — See TRAFFIC ACCOMMODATION.

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proaching Crossing — Rule of Company.] — See NEGLIGENCE, 5, 7.

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Offence of Company—Conviction of Officer—Passengers.] — See CRIMINAL LAW.

TOLLS.

Reduction of Rates on Concrete Blocks—Standard Tariffs —Railway Act, ch. 37, R.S.C. 1906, secs. 323, 327, 401 — Powers of Board — Retroactive Alteration of Tariff — Rebate and Refund of Tolls already Charged.]—The Dominion Concrete Company complained to the Board that there was an unjust discrimination in favour of bricks as against concrete blocks in the freight rates charged.

After these rates had been satisfactorily adjusted and those on concrete blocks reduced the company applied to the Board for a refund of the difference between the higher and the reduced rate.

Held, that under sections 323, 327 and 401, of chapter 37, R. S.C. 1906, the Board has no power to make a retroactive alteration in a tariff and grant rebates and refunds of tolls which have been charged. Dominion Concrete Co. v. Canadian Pacific R.W. Co., 514.

Terminal Facilities — Traffic —Branch Line—Division of.]— See INTERCHANGE OF TRAFFIC.

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TRAFFIC ACCOMMODATION.

Board of Railway Commissioners — Jurisdiction — Traffic Accommodation — Restoring Connections—3 *Edw. VII. ch. 58, secs. 176, 214, 253.*]—On an application to the Board of Railway Commissioners for Canada, under the provisions of the Railway Act, 1903, for a direction that a railway company should replace a siding, where traffic facilities had been formerly provided for the respondents with connections upon their lands, and for other appropriate relief for such purposes:—

Held, that, under the circumstances, the Board had jurisdiction to make an order directing the railway company to restore the spur-track facilities formerly enjoyed by the applicants for the carriage, despatch and receipt of freight in carloads over, to and from the line of railway. *Canadian Northern R.W. Co. v. Robinson*, 101.

TREES.

Injury to — Running Trial Line—Negligence — Arbitration — Damages.]—*See* TRESPASS, 3, 4.

TRESPASS.

1. *Taking Possession of Land — Possessory Title of Occupant — Continuing Trespass — Limitation of Actions — Railway Act, 1903, sec. 242.*]—The plaintiff and his predecessors in title were in possession as trespassers of certain land since 1871; the defendants entered upon a portion of it in 1890 and constructed their railway upon it and continued in undisturbed possession of such portion until 1904 and no claim was made for the land so taken though the defendants were willing to pay compensation to any one who could prove that he was entitled to it.

In the year 1905 the plaintiff brought this action of trespass. The defendants pleaded (1) that he was not the owner of the lands; (2) that his claim, if any, was barred by the Statute of Limitations:—

Held (Tuck, C.J., and McLeod, J., *dissenting*), that though the plaintiff or his predecessor in title was originally a trespasser, yet having been in peaceable possession at the time of the defendants' entry on the lands, he was entitled to damages for being disturbed in his possession.

2. That each passing over the land was a new trespass and therefore the defendants would be liable for all except for so

much as was barred under their plea of the Statute of Limitations which only voids a remedy and does not change the nature of the Act. *Clair v. Temiscouata R.W. Co.*, 171.

2. *Appeal—Order Extending Time—Jurisdiction—R.S.C. ch. 135, sec. 42—Practice—Trespass—Possession—Evidence—Expropriation.*]—The Court refused to entertain a motion to quash the appeal on the ground that it had not been taken within the sixty days limited by the statute and that an order by a Judge of the Court appealed from after the expiration of that time was *ultra vires* and could not be permitted under section 42 of the Supreme and Exchequer Courts Act, R.S.C. ch. 135.

The casual use of land for pasturing cattle in common with other persons does not constitute evidence of possession sufficient to maintain an action for trespass.

Judgment appealed from reversed. *Temiscouata R.W. Co. v. Clair*, 367.

3. *Railway Act, 1888, secs. 90, 92, 146—Action for Damages in Running Trial Line—When Remedy Limited to Arbitration—Damages Resulting from Exercise of Statutory Powers.*]—If damages are occasioned to a landowner by the exercise of the

powers conferred on a railway company by the Railway Act and there is no negligence in the mode of exercising such powers, the person injuriously affected is limited to the provisions of the Act for compensation. *C. P. R. v. Roy* (1902), A.C. 220, and *Bennett v. G.T.R.* (1901), 2 O.L.R. 425. But if there is negligence in such exercise of statutory powers, or if damages are unnecessarily inflicted, then an action will lie and the complainant is not limited to the remedy given by the arbitration clauses of the Act.

The plaintiff's claim was for damages for cutting down trees in his grove through which the defendants were making a survey for a trial line for a proposed branch of their railway, but the possibility of running the trial line through the grove without cutting down the trees by making a rectangular detour around it was not raised at the trial and the trial Judge did not pass upon it.

Held, that the plaintiff, who had been nonsuited at the trial was entitled to a new trial to determine whether the line could not have been run in the manner suggested. *Barrett v. Canadian Pacific R.W. Co.*, 356.

4. *Railway Act, 1888, secs. 90, 92, 146—Action for Damages for Cutting Down Trees in Running Trial Line—When Remedy*

Limited to Arbitration—Damage Resulting from Excess or Negligence in Exercising Statutory Powers.]—At the new trial ordered in the foregoing case, the County Court Judge again nonsuited the plaintiff who appealed to the Court of Appeal.

Held, that the evidence shewed that it was unnecessary to cut down the trees for the purpose of running the required trial line and that the plaintiff was entitled to recover in the action, and that judgment should be entered for him for \$250 damages and costs of both trials and both appeals. *Barrett v. Canadian Pacific R.W. Co.*, 364.

Illegal Entry — Irregularity—Absence of Notice.]—See EXPROPRIATION, 7.

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thority of Arbitrator — Illegality.]—See EXPROPRIATION, 3, 4.

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